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THE JOHN HOPKINS STUDIES IN ROMANCE LITERATURES
AND LANGUAGES

EXTRA VOLUME II

THE COMMONPLACE BOOK
OF
THOMAS JEFFERSON

A REPERTORY OF HIS IDEAS ON GOVERNMENT

With an introduction and notes

BY

GILBERT CHINARD
PROFESSOR IN THE JOHNS HOPKINS UNIVERSITY

THE JOHN HOPKINS PRESS
BALTIMORE, MARYLAND

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DE FRANCE, PARIS

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*L'Exotisme américain dans la littérature française au XVI*e siècle. Un volume in-16, Paris, Société des Belles-Lettres.

*L'Amérique et le rêve exotique dans la littérature française au XVII*e *et au XVIII*e *siècle.* Un volume in-16, Paris, Société des Belles-Lettres. *Ouvrage couronné par l'Académie française.*

L'Exotisme américain dans l'œuvre de Chateaubriand. Un volume in-16, Paris, Hachette.

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Notes sur le voyage de Chateaubriand en Amérique. Un volume in-8, University of California Press.

Chateaubriand « Les Natchez ». Livres I et II. Un volume in-8, University of California Press.

Volney et l'Amérique, d'après des documents nouveaux et sa correspondance inédite avec Jefferson. Un volume in-8, Paris, les Presses Universitaires, et Baltimore, The John Hopkins Press.

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Jefferson et les Idéologues, d'après sa correspondance inédite avec Destutt de Tracy, Cabanis, J.-B. Say et Auguste Comte. Un volume in-8, Paris, les Presses Universitaires et Baltimore, The John Hopkins Press.

Destutt de Tracy « De l'Amour », publié pour la première fois en français avec une introduction et des notes. Un volume in-12, Paris, Société des Belles-Lettres.

Les Réfugiés huguenots en Amérique, avec une introduction sur « le Mirage américain ». Un volume in-12, Paris, Société des Belles-Lettres.

Pensées choisies de Montesquieu tirées du « Common-Place Book » de Jefferson, avec une introduction. Un volume in-12, Paris, Société des Belles-Lettres.

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INTRODUCTION

I

THE MANUSCRIPT OF THE « COMMONPLACE BOOK »

The first authoritative biographer of Jefferson, Henry S. Randall, in one of the chapters devoted to the early career of his hero, has deplored the fact that because of the fire which destroyed the house of Jefferson's mother in 1770, most of the books and papers which the young man possessed at that time perished beyond any hope of recovery. In a letter written shortly after the disaster to his friend John Page, Jefferson himself indicated the extent of the damage :

My late loss may perhaps have reached you by this time; I mean the loss of my mother's house by fire, and in it of every paper I had in the world, and almost every book. On a reasonable estimate I calculate the cost of the books burned to have been £200 *sterling, Would to God it had been the money, then had it never cost me a sigh. To make the loss more sensible, it fell principally on my books of Common Law, of which I have but one left, at that time lent out. Of papers too of every kind I am utterly destitute. All of these whe-*

ther public or private, of business or of amusement, have perished in the flames (Feb. 21, 1770. *Memorial edition, I V*, 19.)

We are hardly better informed for the period which elapsed between 1770 and 1780. The letters ranging between these dates are few, and were it not for the *Autobiography*, written much later, we should be practically unable to reconstitute, even imperfectly, the intellectual formation and development of Jefferson during the years which immediately preceded the Declaration of Independence.

It did not take him long however to form a new library ; an entry in his unpublished *Diary* is very significant in that respect :

August 4,1773. My library.

In the mahogany book case with glass doors.	510	vols
Walnut book case in N. W. corner of room...	180	»
Walnut book case in N. E. corner of room....	224	»
Shelves in N. W. corner of room............	157	»
Shelves in N. E. corner of room............	131	»
Lent out..........	42	»
Lying about..............................	10	»

Note this does not include vols of Music, nor my books in Williamsburgh 1254

This was, considering the date, a large collection to get together in the short space of three years, but of course a merely quantitative indication is very unsatisfactory. Another document hitherto neglected may enable us to determine with some degree of probability the titles of at least some of the books which at that date formed Jefferson's working library.

From a letter written to Thomas Cooper in 1814, Randall had established that Jefferson, « during these years had kept a common-place book », but he did not seem to have suspected that any part of it had been preserved except the « sample » given in the letter (*The Life of Jefferson, I*, 52).

Since Randall's time, the *Commonplace Book* was discovered in the Jefferson papers, but it received only casual attention from several writers, who did not consider that it contained anything of particular significance. The manuscript has been rebound, and is now kept in the collections of the Library of Congress where it can be consulted.

The manuscript forms a volume of 158 leaves covered on both sides with small, compact handwriting, not less than 35 or 36 lines to the page, but perfectly legible and in very good condition. Bound with it are 30 leaves, entitled *Grounds and Rudiments*, written apparently by someone else, notes taken by a law-student and consisting solely of elementary definitions of legal terms. The ink is much faded, the handwriting different, and there is no evidence that these pages are in the hand of Jefferson.

The possible value of the manuscript was called to my attention, rather accidentally, by Mr. John C. Fitzpatrick of the Manuscript Division of the Library of Congress, who was of great assistance in helping to determine its date. I was further encouraged in this study by my colleagues, Professors J. H. Latané and W. W. Willoughby of the Johns Hopkins University. Professor G. Gruenbaum assisted me in reading the Italian part of the proofs ; to him and particularly to Professor L. P. Shank who gave me his friendly cooperation in the preparation of the manuscript, all my thanks are due.

No attempt has been made in this edition to multiply the foot-notes or to write an exhaustive introduction; even such indications as were found necessary to point out the importance of certain sections have been reduced to a minimum. If, as we believe, the *Commonplace Book* contains material of interest to students of American history, if it throws a new light on the origin of Jefferson's theories, it will remain for others to utilize more fully the documents here published. Our sole purpose is to make available to the public a manuscript which may well be considered as the source-book and repertory of Jefferson's ideas on government. Except for the omission of some passages which have been simply listed by titles, the manuscript is here reproduced as written by Jefferson. No attempt has been made to correct the peculiarities of his spelling; a few French accents have been changed from *è*, the only form used by Jefferson, to *é*; but no accents have been placed on Greek words, as it seems to have been Jefferson's constant practice to omit them entirely.

II

THE DATE OF THE MANUSCRIPT

The value of such a document depends to a large extent on the date of its compilation. If we accept Jefferson's word for it the *Commonplace Book* must have been written considerably earlier than 1776. In a letter to Thomas Cooper, dated January 16, 1814, Jefferson, after discussing the origin of the common law referred for the first time in his correspondance to his *Common Place Book*, as follows :

> *I could give you a curious sample from a note in my common place book, made while I was a student : but it is too long to be copied. Perhaps I may give it to you with some future letter.* (*M. E. XIV*, 56)

A month later he found time to copy the promised abstract and sent it to Cooper with an apology for the boldness of the ideas it contained :

> *In my letter of January* 16, *I promised you a sample from my common place book, of the pious dispositions of the English judges, to connive at the frauds of the clergy, a disposition which has often rendered them faithful allies in practice. When I was a student of the law now half a century ago, after getting through Coke Littleton, whose matter cannot be abridged, I was in the habit of abridging and common-placing what I read meriting it, and of sometimes mixing my own reflections on the subject. I now enclose you the extract from these entries which I promised. They were written at a time of life when I was bold in the pursuit of knowledge, never fearing to follow truth and reason to whatever results they led, and bearding every authority which stood in their way. This must be an apology, if you find the conclusion bolder than historical facts and principles will warrant.* (*To Thomas Cooper, Feb.* 10, 1814. *M. E. XIV*, 85).

The expression « half a century » ago, if accepted literally, would take us back to 1764, — a date manifestly impossible for the whole of the manuscript, since we find in it many entries dated several years later. If that date is to be considered, it can only be with reference to the first hundred pages, which deal exclusively with points of procedure such as may have interested an aspiring lawyer.

On the other hand the very last line of the manuscript contains a reference to *The Globe* of March 24, 1824, which shows at least that Jefferson kept adding material to his note-book practically until his death.

The period between 1764 and 1824 covers the manhood and old age of Jefferson, and if we had no other data, the task of dating the manuscript would be well-nigh hopeless. Fortunately other indications make it possible if not to date exactly every article in the manuscript, at least to attain a sufficient approximation for some of the most important articles.

First of all, a study of the *Commonplace Book* will show that, if we exclude the last four leaves (articles 882-905), no reference is made anywhere to any book printed after 1776 or to any event which took place after that date.

On the other hand, a number of definite statements allow us to infer that many important parts were written before or shortly after the Declaration of Independence.

The first significant statement from this point of view is article 64, which could not possibly be of any interest to Jefferson after the American colonies had decided to separate from their mother country.

64. *By* 23. *H.* 8. *c.* 3, *no attaints can be brought but in R. B. or C. B.* 3. *Inst.* 223. (*I apprehend that no action can be originally commenced in England where the cause of the action accrues and the def. dwells in Virginia ; and that no such action can come before the judges of England but an appeal from the supreme court here. Now,* 23 *H.* 8. *c.* 3. *by obliging the first step in an attaint to be taken in R. B. or C. B. into which courts we cannot have access... in the first step, has effectually excluded us from the benefit of the act.*)

Even more significant perhaps is number 231, which would be meaningless if written after 1776.

231. *The laws of England do not extend to Virginia, which being a conquered country, their law is what the king pleases. Holt. Smith v. Brown and Cooper.* 2. *Salk.* 666.

There can be very little doubt that all of the first part of the *Commonplace Book*, articles 1 to 694, which we did not think necessary to reprint in full, represents the work of a young lawyer trying to get acquainted with the procedure of the Courts ; it would have been of little value to Jefferson after he abandoned the profession. He had occasion to use the knowledge thus acquired, particularly when he undertook to cooperate in the revision of the statutes of Virginia, but he would hardly have thought it worth his effort and his time after he actively engaged in politics.

Far more important for our purpose is the comment of Jefferson on a passage of Montesquieu. Discussing the distribution of natural resources between the nations of the world, the author of *The Spirit of Laws* had written : « *Il peut se trouver un état si malheureux qu'il soit privé des effets des autres pays, et même encore de presque tous les siens : les propriétaires des fonds de terre n'y seront que les colons des étrangers* ».

Jefferson was struck by the evident application which could be made of this statement to the conditions under which the British colonies of America labored, and added in a significant way the following foot-note :

« *This melancholy truth applies to the American colonies whose trade is so regulated by a foreign commercial power as to center all it's benefits in herself* » *(See page* 284*)*.

For one thing, the use of the present tense *applies* must be noted ; further more it is very improbable that Jefferson would have used such an expression as *the American colonies* after the independence of the United States had been proclaimed. Hence we may safely conclude that he read and abstracted Montesquieu's *Spirit of Laws* at a time when such an appellation was still acceptable, certainly before 1776, and possibly even before 1775. It may be added that, since the items of the *Commonplace Book* are numbered consecutively, and the part on Montesquieu begins with number 775, the anteriority of all the preceding entries offers little doubt.

Let us now see whether it is not possible to determine still more exactly the date at which he made a detailed study of Montesquieu's work. Article 740 is a long abstract from Blackstone on the origin of feudal estates, a passage with which he was familiar when he wrote his *Summary view on the Rights of British America,* as a comparison of the texts easily shows (See page 190).

On the other hand, article 747, which lists the acts of the Virginia Assembly relating to fees, ends with this item :

« 1772. *c.* 4. *to continue till April,* 12, 1774, *at which time it expired* ».

There we have a definite date ; unfortunately this entry constitutes the last line of a paragraph, at the end of a page, and is separated from the others by a long space. Hence we cannot affirm that it was not written some time after, or even a long time after the following articles.

Article 750 is somewat more precise ; it begins with this declaration of Jefferson :

« *There are certain articles in the Constitution of the Helvetic body also worthy of attention in constituting an American Congress* ».

Such a sentence could hardly have been written long after the Declaration of Independence, and there is at least a strong likelihood that it was written before. All the evidence we have found tends consequently to establish the fact that Jefferson had read Montesquieu between 1774 and 1776.

The same conclusion would apply to article 832 which begins as follows :

« *Those who allege that the parliament of Great Britain have power to make laws binding the American colonies reason in the following manner...* »

But again in 834 we find another precise date, since the entry contains a quotation of the *Parliamentary* *register of* 1775. Articles 852 to 861 are largely based upon Voltaire's *Essai sur les mœurs*, volumes 14,15 and 16. I have not been able to consult the exact edition used by Jefferson, but as L'*Essai sur les mœurs* constitutes the volumes XI to XVII of the edition of 1756, and since Jefferson gives as reference for 852 — 14. *Voltaire*, 374. *Essai sur les mœurs*, c. 6, and also quotes from volume 14, the *Philosophie de l'histoire*, everything tends to indicate that he refers to the edition of 1775, in which the *Essai sur les mœurs* constitutes volumes XIV to XVII. In all subsequent editions, even in the edition of 1768, the title *Introduction* is given to the *Philosophie de l'histoire* ; consequently we may accept the conclusion that these abstracts from Voltaire were notenter ed in the *Commonplace Book* before 1775 (1).

For 873 and 879, which are reproduced verbatim in Jefferson's letter to Cooper, we have the statement of the author himself that they were written when he was « a student of the law ». The term is somewhat vague and susceptible of several interpretations. That it cannot be taken literally is evident : Jefferson's memory must have been somewhat hazy when he made the statement. He indicated himself a different and more acceptable date in a letter written in 1824 to Everett, in which he again discussed the origin of the Common Law :

I do not remember the occasion which led me to take up this subject, while a practitioner of the law. But

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(1) See Bengesco, Voltaire, *Bibliographie de ses œuvres*, vol. I p. 335.

I know I went into it with all the research which a very copious library enabled me to indulge and I fear not for the accuracy of any of my quotations (Oct. 15, 1824. *M. E., XVI*, 83).

The most plausible explanation would then be to take the expression in its most general sense and to consider that Jefferson simply alluded to a period when he was still interested in the study of the law. This would particularly fit the time when he was working on the revision of the statutes of Virginia, in 1776 ; and we shall see later that it was probably on this occasion that he undertook to determine the origin and history of Common law.

On the other hand we must discard the hypothesis that Jefferson would have re-arranged at some later date the order of the abstracts. Although the pages of the *Commonplace Book* were not numbered by him, the articles bear consecutive numbers, they overlap from one page to the other, and all the pages are written on both sides, which would have made such a re-classification utterly impossible.

Unless we are to believe that Jefferson deliberately attempted to deceive Thomas Cooper about the date of his « history of the common law », — and he had no reason whatever to do so — we can safely come to the conclusion that the *Commonplace Book*, at least as far as the first 879 entries are concerned, was written when Jefferson was still a young man, before the conflict between the American colonies and the mother-country became quite acute, and certainly before the existence of the United States of America had become an accepted fact.

To be more definite and to attempt to date more exactly the different parts of the manuscript would be dangerous and misleading. The evidence given by the handwriting and the color of the ink is very dubious. A certain progress could perhaps be noted in the first third of the manuscript. The other differences are too slight to be relied upon ; after 1776 the handwriting of Jefferson changed very little, and to date his manuscripts on that sole criterium would certainly be inconclusive.

A break occurs in the manuscript on the verso of page 153, where two-thirds of the page was left blank. The next page begins with an abstract from Blackstone's *Reports of cases determined in the several courts of Westminster Hall from* 1746 *to* 1779, published in 1781.

Articles 901, 902 and 903 are taken from Chr. Robinson : *Reports of cases argued and determined in the High Court of Admiralty* ; *commencing with the judgments of the Right Honorable Sir William Scott*, 5 volumes published between 1800 and 1807. The fourth volume, not published until 1804, is quoted in article 901. For the first time we are confronted with a date which belongs to an entirely different period of the life of Jefferson.

Article 904 is a quotation from d'Holbach : *Tertullian maintained that god is material*, also used by Jefferson in a letter to Cooper, *Aug*, 14, 1820. *M. E. XV*, 215.

Article 905 is a collection of abstracts from Hume on popular sovereignty, chosen with an evidently sarcastic purpose and ending with the following quotation :

« *In a debate in the House of Commons* Mar. 23. 24. *Sir James Mc Intosh quotes Burke as having said in one speech « I believe we shall all come to think, at last, with Mr. Hume, that an absolute monarchy is not so bad a thing as we supposed. »* Marc. 24, 1824. »

This indication loses much of its significance from the fact that it is found in the last line of the last entry of the manuscript. It cannot be used to determine the date of the *Commonplace Book* as a whole, and simply shows that Jefferson kept making entries in it even during the last years of his life. It may be added that the first 156 pages of the manuscript are written on woven paper such as was used by Jefferson and his contemporaries for their correspondance during the colonial period. Pages 157 and 158 are written on a smooth paper of different quality and bearing in the water-mark the date of 1799. As these last two pages contain the discussion on the rights of neutrals taken from Robinson's book printed after 1800, this fact is evidently of little importance.

To sum up the discussion : it seems that we may assume with reasonable certainty : that the bulk of the *Commonplace Book* represents the notes taken by Jefferson on law, political science, and religion during his formative years ; that there is little doubt that the first hundred pages or so, containing some 550 entries, were compiled at a time when Jefferson, either a student of law or a young lawyer, was primarily interested in questions of legal procedure ; that the articles on feudal laws, the survey of the federative system of governement, the extracts from Montesquieu and Beccaria, the history of the Common law (articles 550 to 882) were written after 1774 and not later than 1776; that the last part of the *Commonplace Book* (882 to 905) was compiled at a date which cannot be ascertained, but certainly after 1781 for the part referring to Blackstone and after 1801 for the extracts from Robinson.

Such are the conclusions which external evidence can warrant. A survey of the contents of the Commonplace Book may now bring some additional information.

III

THE COMMONPLACE BOOK

The articles 1 to 29 inclusive are mainly compiled from George Andrews : *Reports of cases argued before the King's Bench during the* 11 *th,* 12 *th,* 13 *th years of the reign of George III*, 1737-1740. Folio edition, London, 1754. They deal with strictly legal matters and are printed by titles only in this publication.

Articles 30 to 78 are taken from *The Third part of the Institutes of the Laws of England... Authore Edw. Cook, milite,* and from the *Fourth part of the Institutes,* by the same author. London, 1671. The articles which refer to matters again treated by Jefferson in his *Bill for proportioning Crimes and Punishments* are all here printed in full, the other articles by title only.

Articles 79 to 259 are largely derived from William Salked : *Reports of cases in the King's Bench*, 1689-1712, London, 1717-1718. Except for 231 and 242, which deal respectively with the extension of the laws of England to Virginia and the legal status of alien enemies: they are not printed here.

Articles 260-550 are abstracts from Robert Raymond : *Reports of cases argued and adjuged in the Courts of King's Bench and Common Pleas in the reigns of the late King William, Queen Anne, King George I, and his present Majesty.* London, 2 vols., folio, 1743. Except for 320, which deals with the condition of aliens, they are not here printed in full.

Articles 550 to 555 are here reproduced because of their possible bearing on the measures recommended by Jefferson when the revision of the statutes of Virginia was undertaken.

Article 555 is indicated only by a number in the manuscript and Jefferson never completed it, although he left a blank of several lines.

Article 556, printed in full, contains an exposition of the doctrine of feoffments from Coke Littleton and a synoptic summary of « conditions » drawn by Jefferson.

This first part of the *Commonplace Book* calls for but few remarks. The matters there analyzed by Jefferson would be of interest in studying Jefferson as a lawyer, and indirectly may throw some light on cases which where apt to come up before the courts of Virginia before the Revolution. Complicated cases of inheritance, trespassing on other's property, debts contracted by a wife without the knowledge of her husband, responsibility of masters for acts committed by their servants, all the dull routine of civil courts in a small town can be found there ; they only serve to show with what care and thoroughness Jefferson had prepared himself for the bar, and how well deserved was his reputation, in his native state, as an outstanding young lawyer.

LORD KAMES

Articles 557 to 569 are taken from Lord Kames : *Historical Law Tracts*, published for the first time in 1758. They mark the beginning of Jefferson's interest in more general questions. An enumeration of the tracts studied and abstracted by Jefferson will suffice to indicate the extent of the influence exerted by the Scotch jurist on the formation of the young Virginian.

TRACT I.	Criminal Law................	Jefferson § 557
TRACT II.	Promises and Covenants	Jefferson § 558
TRACT III.	Property.....................	Jefferson § 559
TRACT IV.	Securities upon land for payment of debt..............	Jefferson § 560
TRACT V.	Privilege of an heir apparent in a feudal holding to continue the possession of his ancestor	Jefferson § 561
TRACT VI.	Regalities and privileges of Repledging....................	Omitted by Jefferson
TRACT VII.	Courts	Jefferson § 562
TRACT VIII.	Brieves......................	Jefferson § 563
TRACT IX.	Process in absence...........	Jefferson § 564

TRACT X.	**Execution against moveables and land for payment of debt**	**Jefferson § 565**
TRACT XI.	**Personal execution for payment of debt....................**	**Jefferson § 566**
TRACT XII.	**Execution for obtaining payment after death of the debtor**	**Jefferson § 567**
TRACT XIII.	**Limited and universal representation of heirs...........**	**Jefferson § 568**
TRACT XIV.	**Old and new extent..........**	**Omitted by Jefferson**

Only twice during his career did Jefferson specifically refer to the writings of Lord Kames, whose name, curiously enough, he persisted in writing *Kaims*, as in the *Commonplace Book* (1). He recommended the reading of his works to Peter Carr, although he admitted that his author was not without some faults :

> *Your objection to Lord Kaims, that he is too metaphysical, is just, and it is the chief objection to which his writings are liable. It is to be observed also that though he has given us what should be the system of equity, yet it is not the one actually established, at least not in all parts. The English chancellors have gone on from one thing to another without any comprehensive or systematic view of the whole field of equity, and therefore they have sometimes run into inconsistencies and contradictions. — To Peter Carr, June* 22, 1792. *M. E., VIII,* 384.

More than twenty years later, his admiration for Kames had not diminished, although he had not read his works for about fifty years, — a significant admission and an indirect confirmation of the date of these abstracts.

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(1) The form Kaims was used in America as shown by the following title : *Six sketches on the history of man... by Henry Home, Lord Kaims.* Philadelphia, 1776. As far as I know the *Law Tracts* were never reprinted in America ; as the book was published in England without the author's name Jefferson's spelling may simply be a phonetic transcription of a name he had heard.

To these might be added Lord Kaims, one of the ablest of our advocates, who goes as far as to say, in his Principles of Natural Religion, that a man owes no duty to which he is not urged by some impulsive feeling. This is correct, if referred to the standard of general feeling of a single individual. Perhaps I may misquote him, it being fifty years since I read his book. — To Thomas Law. June 13, 1814. *M. E. XIV*, 144.

What exact profit and information was derived by Jefferson from the *Law Tracts* cannot easily be determined. Many sentences in Kames sound quite Jeffersonian and Jefferson could only approve of such a declaration of principles as this :

« *Mutual defence against a more powerful neighbor being in early times the chief, or sole motive for, joining society, individuals never thought of surrendering any of their natural rights which could be retained consistently with their great aim of mutual defence* » # 557.

He himself might have written the definition of society found in Kames' *History of Property* :

« *Man, by his nature is fitted for society, and society by it's conveniences is fitted for man. The perfection of human society consists in that just degree of union among the individuals, which to each reserves freedom and independency, as far as is consistent with peace and good order. The bonds of society where every man shall be bound to dedicate the whole of his industry to the common interest would be of the strictest kind,* *but it would be unnatural and uncomfortable, because destructive of liberty and independency ; so would be the enjoyment of the goods of fortune in common.* » § 559.

I am perfectly aware of the undeniable influence of Locke upon the theory of Kames ; and it would be very unlikely that Jefferson had not read Locke's *Treatise on Civil Government* at that date (1). The fact remains however that neither Locke, nor as far as I know, any other political thinker of the period, had yet so clearly defined that particular combination of individualism and respect for peace and good order which is so characteristic of the American conception of democracy. Jefferson could have endorsed without any change the whole *Tract on Property*, from the beginning to the conclusion — which he echoed in his *Bill to abolish entails* and in his proposal to abolish primogeniture.

In Kames, at any rate, he found a complete exposition of the theory of natural rights ; and from the evidence furnished by the *Commonplace Book* it cannot be doubted that the Scottish Lord was for him a master and a guide.

DALRYMPLE

No less important for a study of Jefferson's ideas is Sir John Dalrymple, the author of an *Essay towards a general history of Feudal Property in Great Britain*, London, 1757. In him, Jefferson was able to find, historically established, the same principles as in Kames, with a much more precise and emphatic condemnation of the system of entails and primogeniture. Article 576, entitled by Jefferson *History of Entails*, is particulary interesting in this respect, and the « young student of law » much have been especially struck by this conclusion :

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(1) For abstracts from Locke, see the *Appendix*.

« *A lawyer again, inquisitive in tracing laws, their regular progress and declension, would, unmoved by clamor, reflect that the inconveniencies prophecied, tho' plausible in appearance, have hitherto come to nothing, and that if they should ever happen, our entails will share the fate of almost all the other remains of the feudal law, be abolished* (♯ 576, *in fine*).

In the chapter entitled *History of the rules of Descent*, Jefferson may have learned that during Saxon times, « the inheritance was equally divided among all the sons, but this law of nature, and of the world, gave way to the incompatibility of the feudal services being performed by many, and the succession was restrained to one son to be chosen by the grantor ». (♯ 577) At least the idea there expressed is quite in line with the theory maintained by Jefferson when he drew up the laws which « have laid the axe to the foot of pseudo aristocracy (1) ».

Articles 585 to 588 are taken from Hale's *History of the Common law*, London, 1716, the first two articles dealing with the expression *time within memory*, but the last containing a complete tabulation of the rules of descent.

Articles 588 to 693, printed by title only, are miscellaneous abstracts from Croke's *English King's Bench Reports tempore Elizabeth,* and refer to purely legal matters.

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(1) See *Letter to John Adams, Oct.* 28, 1813, *M. E., XIII*, 399, and *Thoughts on lotteries, February* 1826, *M. E., XVII*, 461, also the passage in the *Autobiography*, which is even more striking.

Article 694, taken from Kames: *Natural religion,* deals with the Lacedemonian constitution, and is the only reference to that work found in the *Commonplace Book.*

Article 695, on inheritance « among the antient Irish » comes from F. Warner's *History of Ireland,* published in 1763.

PELLOUTIER

Article 694 marks the beginning of a long series of entries on the history of the early populations of Europe. It may be that mere curiosity and desire for information impelled Jefferson to make this systematic survey. As a matter of fact, it seems from the nature of these abstracts that he had a definite purpose in mind, namely, to demonstrate to himself that the oldest forms of government known to the primitive peoples of Europe rested on popular sovereignty. In Pelloutier's *Histoire des Celtes* and *Histoire des Galates,* La Haye, 1740-1750 and Paris, 1771, he found an elaborate description of the life, origin and customs of the Celts (#708), Galates of Asia Minor (#713), Germans (#713), and Gauls (#715), peoples who, as the earliest records show, were « libres et indépendants », maintained no permanent military organization and elected their chiefs when they were attacked by a foreign aggressor.

This is not the place to discuss the accuracy of this somewhat idealized picture of the tribes described by Strabo and Tacitus, which was accepted by Jefferson at its face value. He found in Pelloutier not only an historical confirmation of the doctrine of natural rights but also a demonstration of the right of colonies to govern themselves independently. This is evidently the meaning of the short note he added to the considerations of Pelloutier on the Pelasgians : « neither the Egyptians nor the Phenicians ever pretended any right of dominion over the Greeks their colonists ». For a more detailed demonstration however, he had to consult another writer whose work dealt more especially with the history of Greece.

STANYAN

Article 717 begins with these words : « Stanyan sais that the first kings of Greece were elected by the free consent of the people ». — Once more, Jefferson found in a reputable historian a confirmation of the doctrine of popular sovereignty. But what attracted him particularly in the *Grecian History down to the death of Philip of Macedon*, London, 1739, was the picture of the relations between the colonies established by different Greek cities and their metropolis.

There he saw that « Corinth planted its two famous colonies of Syracuse and Corcyra being themselves a people engaged principally in trade and merchandise... these colonies were at first subject to Corinth their metropolis, and were governed much after the same manner; but as they increased in power, they renounced their obedience (♯718) — The Samians « a colony of Athens, could make a defensive alliance with Sparta without any offence being taken by the Athenians ». (721); Mycenae threw off « their dependence on Argos » (♯722); — the inhabitants of Potidæa refused to demolish their walls at the command of Athens (♯723); — Syracuse was a Corinthian colony and was helped by Corinth to recover its liberty (♯ 724). Thus Jefferson found example after example of colonies refusing to be subjected to the cities that established them, and completed his information by examples taken from Plutarch (725) and from Sir Walter Raleigh: *History of the World*. His was truly the mind of a lawyer rather than that of an inspired enthusiast: even when writing the Declaration of Independence he was still preoccupied with precedents.

Article 731 presents an historical discussion on the origin of the slave trade, in which Jefferson quotes Malachy Postlethwayt's *The Universal Dictionary of Trade and Commerce*, London 1751; — Lediard's *Naval History of England in all its Branches* London 1735; — and Campbell's *Lives of the Admirals and other eminent British Seamen*, 1742-1744.

Article 732, attributes to Edmund I the institution of capital punishment and refers to « *Orrery's hist. Engl. Letter* 8 », which I have not been able to identify.

THE FEUDAL SYSTEM

Articles 733-741 take up again the history and development of the English feudal system. Following Spelman's *Glossarium archaiologicum,* Jefferson attributes its introduction in to England to the Norman conquest (#733). In 734, he discusses the etymology of *feodum* or *fee,* taken from the same author. Continuing the same subject in 735, he quotes for the first time Montesquieu, whom he supplements with Spelman, Somner's *Treatise on Gavelkind,* London 1660 and 1727, and Blackstone (735-741.)

Articles 741-748 contain a long technical discussion on the origin of legal fees, in which the *Institutes,* Coke Littleton, Bracton and many English statutes are quoted ; it ends with a list of the acts of the Virginia assembly relating to fees (#747).

Article 748 is a definition of « *consuetudo* », *custom,* as given by Coke Littleton.

THE FEDERATIVE SYSTEM OF GOVERNMENT

The capital part of the Commonplace book is essentially found in articles 749 to 757.

The origin of the most important principles incorporated in the Declaration of Independence, in the articles of Federation, then in the State constitutions and finally in the Constitution of 1787, has long been a subject of controversy among historians. That the fathers of the Constitution derived their inspiration from Locke, that they followed Montesquieu and tried to reproduce his systematized description of the so called « British constitution » ; that several of their ideas were borrowed from Holland, or that they simply extended and developed the underlying principles of the colonial governments — all these are views which have been in turn proposed, maintained, abandoned andrevived.As far as we know, no single explanation has ever been considered entirely satisfactory, and in fact, we know too little about the intellectual formation and preparation of the writers of the Constitution to be able to pass on the question with any reasonable degree of certainty. In a recent book, Mr. Carl Becker has traced the historical development of the most important ideas contained in the Declaration of Independence, and we shall not attempt to discuss anew a subject which has been treated so completely and so well.

Through the *Commonplace book* however, we can now throw more light on one or two aspects of the problem, and reconstitute more easily the historical background of at least one of the signers of the Declaration of Independence.

It may be said here that in spite of the legend propagated by his enemies, Jefferson never was a mere theorist, a dreamer and a rash experimenter. He may have been amused at the vagaries of the

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(1) *The Declaration of Independence, a study in the history of political ideas*, New York, 1922.

French philosophers, he may even have indulged in long discussions of abstract theories with some of his friends. But when it came to what he once called « the real business of life », he always manifested a strong distrust of untried theories, and showed that he was an alert and practical politician, in the better sense of the word. The question which came up for the colonists, even before they proclaimed formally and solemnly their independence, was to find a system of government, through which the colonies, then the new states, would retain both their individuality and their solidarity ; and it is a well-known fact that the federative idea appeared very early in the history of America. Jefferson, with the characteristic bent of a lawyer interested in precedents, undertook a systematic survey of the European nations which had adopted at some period of their development the federative system, in order to find « *articles worthy of attention in constituting an American Congress* (1) ». He consulted Temple, Stanyan, Guthrie, Mallet, Voltaire, Vertot, Molesworth Salmon; he studied the Union of Utrecht, the governments of the Helvetic body, Denmark, Sweden and Poland, and with Molesworth came to the conclusion « *all Europe was beholden to the Northern nations for introducing or restoring a constitution far excelling all others that we know in the world* ». (# 754) He drew up a long list of cases showing conclusively, as he thought, that the crown of England was never hereditary nor testamentary and that, in fact as well as in law, the British kings derived their power from the consent of the governed. He commended the fact that « the laws of Denmark for justice, brevity and perspicuity are excellent », adding from Tacitus a quotation which he could have taken as his political motto : *Corruptissima republica plurimæ leges.* He went into every detail of the convocation of voters and electors, of the constitution and powers of the different assemblies, and availed himself of all possible information on the subject, with the evident purpose of taking from existing and tested systems of federative government whatever feature could be utilized in the « constituting of an American Congress».

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(1) *See* # 750, at the beginning.

A detailed study too long to be undertaken here would be necessary to determine what details and particular regulations of the constitutions of the old world survived through ten years of debates and finally were retained in the American Constitution. It will suffice to mention that Jefferson was not the only member of the Continental Congress to be preoccupied by historical precedents, and that he himself indicated in his *Autobiography* the part they played in the discussions of the articles of confederation. Dr. Witherspoon was the first to call attention to the federations of the old world in quoting the fact « that the Belgic confederation voted by provinces » (*Autobiography, M. E., I*, 84). — « Dr. Rush took notice that the decay of the liberties of the Dutch republic proceeded from three causes, 1° The perfect unanimity requisite on all occasion ; 2° Their obligation to consult their constituents ; 3° Their voting by provinces... Mr. Hopkins observed that... the Germanic body voted by states. The Helvetic body does the same ; and so does the Belgic confederacy. That too little is known of the ancient confederations to say what was their practice, » (*Autobiography*, I, 50-51).

Curiously enough, in his elation over the success of the American experiment, Jefferson was quick to forget later the humble and timid attempts of European nations to establish federative organizations, with the result that he attributed to his contemporaries more boldness and originality than they really ever had. He thus contributed to the formation of the legend which represents the American system of government as an undertaking without precedents, *prolem sine matre creatam* ! But whatever judgment American historians may pass on the value of the material here presented, their importance for a true estimate of Jefferson's political thinking cannot be doubted. In the extracts he made from the histories of various countries one will find most of his favorite contentions : that the federative system of government is the only one which protects liberty against foreign aggressors and permits the development of local liberties ; that the foreign relations of such states ought to be the function of the federal government and that, to use the words which he copied from Montesquieu some time later, « cette sorte de république, capable de résister à la force extérieure peut se maintenir dans sa grandeur sans que sa force se corrompe ».

FEUDAL RIGHTS

Jefferson then returned to the origin of feudal privileges of the nobility and clergy, studying from that particular point of view Robertson's *History* *of Charles V* (757-759). But he gave much more space to a book by Francis Stoughton Sullivan : *An historical treatise of the feudal laws, and the constitution and laws of England... In a course of lectures read in the University of Dublin,* London 1772. (759-775).

He passed without a single mention both the first lecture of the good doctor on *The intention and purpose of political society*, and the second, in which Sullivan boasted of using a method far different from Blackstone's, to come to the third lecture on *Beneficiary and Feudal possessions.* There he disagreed at once with his author. Jefferson could not accept without protest the assertion that feudalism was of German or « Saxon » origin, as it would have been destructive to his favorite thesis that the institution of landed aristocracy had been introduced into England after the Norman conquest. Again and again, he takes exception to statements of Sullivan, and even puts him aside temporarily to go back to Robertson and describe, from more trustworthy sources, the condition of slaves and villains under the feudal system (#760). One passage is particularly worth quoting for in it we may find outlined more clearly than in the *Autobiography* some of the motives which made Jefferson work so ardently for the adoption of the *Bill on religious freedom* :

« *The author then proceeds to shew the origin of the rights of advowson as possessed by laymen ; but his account of them is neither ingenious nor probable. He would make us believe that all those rights are usurpations on those of the clergy ; though the proofs of the reverse are numerous and incontestable, and tho' himself has shewn that for* 1000 *years the right of* *electing bishops was held by the people at large, and was got from them by the combined machinations of the clergy and emperor. In this as well as in many other parts of his book he shews himself to have imbibed principles very unfriendly to the rights of mankind and favorable to the pretended divine right of the king and clergy. Take a sample from this lecture : speaking of the king's title to be supreme Ordinary he sais it stands better settled on the parliamentary declaration, and on the reason of the thing that all coercive power should be derived from him whom God hath made the superintendant, than on the assertions of lawyers that it alwais was so* »(767 *in fine*).

To Sullivan's views on lines of descent he offered no objection, contenting himself with declaring that Sullivan's account is less ingenious and less perspicuous than Dalrymple's (♯577, 578, 579) ; but he could not accept the assertion that the English kings had the power of appointing their successors, and he seized the opportunity to proclaim the true principle which regulates, or ought to regulate, the succession to the crown :

« *In the cases Sullivan mentions of kings appointing their successors, it should be noted that they did not succeed by virtue of that appointment, which the king had no right to make, but of the approbation of the people which attended it and of their oaths of eventual allegiance which they took to the successor at the time of his nomination and which obliged them to support him on the death of his father* » (♯774 *in fine*).

This is quite characteristic of the attitude maintained by Jefferson through the *Commonplace Book*. The authors he read and the texts he compiled can hardly be considered as « sources » for his ideas and principles. In most cases he was seeking in them confirmation of ideas he already had, definite facts with which to strengthen and uphold theories he had already formulated and which, when all is said, were at that time, the common property of all political thinkers.

MONTESQUIEU

No less than 27 articles are given to Montesquieu, they take up 28 pages, more than was given by Jefferson to any other single writer. They constitute one of the most significant parts of the *Commonplace Book*, and will enable us to solve a much mooted question, which has for a long time divided the biographers of Jefferson.

Without going into the details of the controversy, it may be stated that enough evidence can be found in Jefferson's letters to justify the most contradictory points of view. Thus it has been possible to prove with equal plausibility that Jefferson was greatly influenced by Montesquieu's *Esprit des Lois* and, again, that his distrust of the French writer prevented him from accepting many of his most significant theories (1).

The most categorical denunciation of Montesquieu appears as early as 1790 in a letter written to Thomas Mann Randolph :

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(1) For the position taken by some recent historians on the question see G. Chinard, *Pensées choisies de Montesquieu, tirées du Common Place Book of Jefferson*, Les Etudes Françaises, 4e cahier, Paris, 1925.

« *In political economy, I think Smith's Wealth of Nations the best book extant* ; *in the science of government, Montesquieu's Spirit of Laws is generally recommended. It contains, indeed, a great number of political truths* ; *but also an equal number of heresies* ; *so that the reader must be constantly on his guard. There has been lately published a letter of Helvétius, who was an intimate friend of Montesquieu, and whom he consulted before the publication of his book. Helvétius advised him not to publish it* ; *and in this letter to a friend he gives us a solution for the mixture of truth and error found in this book. He says Montesquieu was a man of immense reading* ; *that his object was to throw the whole contents of his commonplace book into systematical order, and to show his ingenuity by reconciling the conctradictory facts it presents* ».

This attitude of distrust is even more marked in a letter written some twenty years later by Jefferson about the *Commentary on Montesquieu* of the French Ideologist Destutt de Tracy (1) :

« *Every man who reflects as he reads, has considered it* (*the Spirit of Laws*) *as a book of paradoxes* ; *having indeed much of truth and sound principles, but abounding also in inconsistencies, apocryphal facts and false inferences.* » *(To Duane, Aug* 12, 1810, *M. E., XII,* 407*)*.

Writing to the same correspondent a month later, Jefferson is even more severe :

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(1) For a detailed treatment of Jefferson's interest in the *Commentary,* see G. Chinard, *Jefferson et les Idéologues,* Paris and Baltimore, The Johns Hopkins Press, 1925.

« *I am glad to hear of everything which reduces that author to his just level, as his predilection for monarchy and English monarchy in particular, has done mischief everywhere, and here also, to a certain degree.* » *(To Duane, Sept.* 16, 1810, *M. E., XII,* 414*).*

It must be remarked however that the earliest mention of Montesquieu so far found in Jefferson's correspondence occurs at the comparatively late date of 1790. On the other hand, another passage in one of his letters to Duane permits us to believe that, at a certain period of his career, Jefferson shared in the general enthusiasm for the *Spirit of Laws.*

« *I had with the world, deemed Montesquieu's work of much merit ; but saw in it, with every thinking man, so much of false principle and misapplied fact, as to render its value equivocal on the whole* » *(To Duane, Jan.* 26, 1811, *M. E., XIII,* 13*).*

This passage, to which sufficient consideration has not been given, contains the key to the problem which has so long divided American historians. It is possible to reconcile those who maintain that Montesquieu greatly influenced the author of the Declaration of Independence and those who deny such an influence. Both groups are right, because both points of view can be supported by sufficient evidence ; but both also fail to recognize that, at a time which remains to be determined, Jefferson changed his estimate of the value of the *Spirit of Laws.* That change had already occured in 1790, and the reasons for it can easily be stated.

The first is, probably, that as soon as he arrived in France, Jefferson was in close touch with those

Frenchmen whom Gouverneur Morris called a little later « *des républicains de la plus belle eau* ». Such was the circle which assembled at the house of Madame Helvétius and into which Jefferson was introduced by Franklin ; such also were the familiars of Madame de Tessé, Lafayette's aunt, the Physiocrats and the Turgotists. Enthusiasm for English ideas and systems was already at a lower ebb among the French political thinkers of the period, and Montesquieu, accused of anglomania, was attacked from many sides. Jefferson himself soon realized that Montesquieu had become the favorite authority of the men who in America were opposed to the ideas which he deemed most essential to the development and growth of the United States. The adversaries of the republican system of government had not failed to note the opinion held by Montesquieu on the difficulty which a republic with a large territory must have in maintaining its integrity : « The opponents of the plan proposed here, have, with great assiduity, cited and circulated the observation of Montesquieu on the necessity of a contracted territory for a republican government (Hamilton, *Federalist*, *N^o^ IX*).

If we are to believe the *Federalist*, no other single writer did more to shape the views of the makers of the Constitution ; but if Montesquieu exerted a beneficial influence in giving them a formula for the doctrine of the separation of powers, what harm did he not do by his constant admiration of everything English, and by what Jefferson would have called his false views and paradoxes :

The oracle who is always consulted and cited on *this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommanding it most effectually to the attention of mankind. The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. — As the latter have considered the work of the immortal bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged ; so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty...* » (*Madison, Federalist, N° XLVII.*)

This blind admiration for everything English was precisely Jefferson's bugbear, and there is little doubt that he considered Montesquieu as a sort of political opponent and the chief support of his most ardent enemies.

That he had felt differently at a former period of his life is conclusively demonstrated by the long abstracts from Montesquieu in the *Commonplace Book*. There are very few of these passages which did not reappear under some form or other, in his correspondence and in the official documents he wrote when Secretary of State or President. As Montesquieu himself was not original, it cannot be assumed that without the *Spirit of Laws*, Jefferson would not have developed his theory of government, or that he would have been in any marked degree different from what he became in his later career. The influence of Montesquieu was superseded by other influences. Jefferson checked the theories of the *Spirit of Laws* by personal observations, and in many instances discarded them ; but it is difficult not to admit that at a certain time Montesquieu exerted a marked influence on him, that he furnished him with formulas, and that he helped to clarify and cristallize many ideas which were still vague and indefinite in his mind at the time he read the masterpiece of the French writer.

From practically every book and every chapter of the *Spirit of Laws,* Jefferson culled sentences, axioms, definitions, neglecting only chapters 21, 27, 28, 30 and 31, which contained historical information he had been able to obtain directly from English sources, such as Kames, Blackstone, Dalrymple and Sullivan.

Curiously enough, even in the chapters he analyzed, Jefferson left out certain developments which, as it seems, should have attracted his attention. The most striking of these omissions is the sixth chapter of book XI, in which Montesquieu defined his famous theory on the separation of powers, and described the so-called « British Constitution ». Did Jefferson believe when he made the abstracts that he had already acquired a better and more direct knowledge of the English system of government than he could possibly obtain from a French writer ? Was he unfavorably impressed by the undisguised admiration of Montesquieu for England ? This is impossible to determine for lack of any precise indication. The fact remains however, that he passed over without any remark the very formula for which he and his friends were to fight so persistently and which is proclaimed in the proposed Constitution of Virginia.

On the other hand, he found in Montesquieu a clear definition of popular sovereignty. He could see how democracy prospers and becomes corrupted (776-778), and what dangers for a republic result from permanent and professional armies. He could compare his theory of punishments with Beccaria's, and he liked the spirit of humanity of Montesquieu's work. He reproduced his theory of federative republics and copied passages on civil liberties. At that date, at least, he was interested in Montesquieu's theories on taxation, and with him condemned slavery. Most important of all he discovered in his chapter on commerce « a melancholy truth » which he applied to the American colonies (♯794). The doctrine of the Act for establishing religious freedom was in strict accordance with the principle developed by Montesquieu (♯797). He shared his scorn for the obscurities of modern statutory language (♯800), as he showed in his revision of the statutes of Virginia. Everywhere in the *Spirit of Laws*, he found illustrations of the theory which he maintained all his life that laws and constitutions are variable and changing and must be altered in accordance with climate, local conditions, and new circumstances. He even went one step further than Montesquieu in his relativism, when he proclaimed that a generation had no right to bind by laws the following generation.

In the text here published one may discover many other similarities. The abstracts from Montesquieu might be edited with a constant commentary taken from Jefferson. Whether in all cases or even in most cases Montesquieu should be considered as the original source of many of Jefferson's ideas is another question, which we shall not attempt to solve. He would not have read Montesquieu and would not have copied these passages, if he had not approved of them, if they had not corresponded to something which he already felt to be true, and if they had not awakened some consonant echo in his mind. That much at least is proved beyond any doubt by the *Commonplace Book.*

Articles 803, 804, and 805 are taken from Allan Ramsay Jr :

Historical essay on the British Constitution, Dublin, 1771. In the first we have an interesting parallel between the Roman senate and the principle of the Saxon *Wittena-gemot* ; while 804 deals with the size of deliberative bodies. Jefferson must have been particularly pleased with the mention that « a free constitution and mode of government has been converted into a downright rank aristocracy of the rich of the land ».

BECCARIA

Beccaria's popularity in America is attested by Jefferson himself in his foot-notes to the text of the *Bill for proportioning Crimes and Punishments*, and in the letter which he sent on this occasion to George Wythe. From Beccaria he copied long passages, abstracting practically every chapter, although it cannot be stated that he reproduced anywhere the humanitarian phraseology of the Italian writer.

JAMES WILSON AND THE DECLARATION OF INDEPENDENCE

Article 832 is in some respects the most interesting and certainly the most puzzling abstract in the *Commonplace Book*. It is taken from James Wilson's pamphlet, entitled Considerations on the nature and extent of the legislative authority of the British Parliament, and published in Philadelphia in 1774, but probably written in 1770. (1)

After briefly summing up the situation of the colonies, Wilson had gone into the question of principle in a way that bears a striking resemblance with the preamble of the Declaration of Independence :

(*A*) *Those who allege that the Parliament of Great Britain have power to make Laws binding the American Colonies, reason in the following manner : That there is and must be in every state a supreme, irresistible, absolute, uncontrouled authority, in which the jura summi imperii, or the rights of sovereignty reside* (2) : — « *That this supreme power is, by the Constitution of Great Britain, vested in the King, Lords, and Commons* ». — « *That, therefore, the Acts of the King, Lords, and Commons,* (3) *or, in other*

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(1) On the circumstances of its publication see Carl BECKER, *The Declaration of Independence.* New York, 1922, p. 105 ff. On Wilson, one may consult R. G. ADAMS, *Political Ideas of the American Revolution*, Durham, N. C. 1922.

(2) Blackstone, 48, 49. *Note of Wilson.*

(3) *Ibid.*, 50, 51. *Note of Wilson.*

words, Acts of Parliament, have by the British Constitution, a binding force on the American Colonies, they composing a part of the British Empire.

(B) I admit that the principle, on which this argument is founded, is of great importance: Its importance, however, is derived from its tendency to promote the ultimate end of all governement. But if the application of it would, in any instance, destroy, instead of promoting that end, it ought, in that instance to be rejected: For to admit it, would be sacrifice the end to the means, which are valuable only so far as they advance it.

(C) All men are, by nature, equal and free: No one has a right to any authority over another without his consent: All lawful government is founded on the consent of those, who are subject to it: Such consent was given with a view to ensure and to encrease the happiness of the governed above what they could enjoy in an independant and unconnected state of nature. The consequence is, that the happiness of the society is the First law of every government (1).

(D) This rule is founded on the law of nature: It must control every political maxim: it must regulate the Legislature itself (2). *The people have a right to insist that this rule be served; and are entitled to demand a moral security that the Legislature will observe it. If they have not the first, they are slaves; if they have not the second, they are, every moment, exposed to*

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(1) This right of sovereignty is that of commanding finally but in order to procure real felicity: for if this end is not obtained, sovereignty ceases to be legitimate authority. Burl. 32. *Note of Wilson.*

(2) The law of nature is superior in obligation to any other. Blackstone 41. *Note of Wilson.*

slavery. For « civil liberty is nothing else but natural liberty, disvested of that part which constitutes the independence of individuals by the authority which it confers on sovereigns, attended with a right of insisting upon their making a good use of their authority, and with a moral security that this right will have its effect (1) ».

(E) Let me now be permitted to ask — Will it ensure and encrease the happiness of the American Colonies, that the Parliament of Great Britain should possess a supreme irresistible uncontroled authority over them ?

In his remarkable study of the Declaration of Independence, Mr. Carl Becker points out and demonstrates more clearly than had ever been done before the close parallelism which exists between the paragraph indicated by (C) and the text of the famous document. He does not seem however to have been particularly impressed by the similarity in the terminology, for it is quite evident that both Wilson and Jefferson followed very closely the words of Locke : « Men being, as has been said, by nature all free, equal and independent, no one can be put out of this estate and subjected to the political power of another without his own consent »... (II, VIII, 95).

Nothing would be more plausible than this explanation were it not for a disconcerting feature of the entry made by Jefferson in the *Commonplace Book* under the name of Wilson.

If we now turn to articles 832 we see that Jefferson copied verbatim paragraphs A and B ; that he omitted altogether paragraphs C and D, and resumed his abstract with the second sentence of E.

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(1) Burlamaqui. *Note of Wilson.* Locke is quoted only once by Jefferson in the *Commonplace Book.* See p. 214, and also *Appendix.*

On the other hand, he entirely neglected the passage of Wilson which contains the very ideas and expressions of the Declaration of Independence and the theory that *happiness is the first law of every government,* which may be implicitly in Locke, but is not so clearly expressed there as it is in Wilson, who took it from Burlamaqui, as his own foot-note to this paragraph indicates.

Thus Mr. Becker's statement that the lineage is direct (Jefferson copied Locke and Locke quoted Hooker) now calls for some reservations. It becomes quite possible that Jefferson remembered not only Locke, but also Wilson, who quoted Burlamaqui, who drew his inspiration from Locke.

Now two hypotheses and only two can be considered. Either Jefferson had not yet abstracted Wilson's pamphlet when he wrote the Declaration, or he read it after writing that famous document.

Again we are confronted with a question of chronology, and the date of the entry, if we could ascertain it, would decide the whole question.

Unfortunately, I am not aware that the *Commonplace Book* contains any data which would enable us to determine exactly the day, month or even the year of article 832.

We saw that in the part concerning Montesquieu (# 794), Jefferson used expressions such as *the American Colonies,* which demonstrates at least that these entries were made some time before the break with England. On the other hand in article 750 Jefferson had made a survey of the Helvetic body in order to find « articles worthy of consideration in constituting an American Congress ». Finally in article 834 we have a quotation of the *Parlamentary Register* of 1775 which probably did not reach Jefferson before the first months of 1776. The most that can be said under the circumstances is that article 832 was written probably sometime during the year 1776, and the problem remains unsolved.

If the entry was made before July 1776, the inference would be that the only two paragraphs in Wilson's preamble which did not seem to Jefferson worthy of consideration are precisely the ones which contain the ideas and principles on which he was to base the Declaration a few months or even a few weeks later. If we bear in mind the equally curious omission of the theory concerning the separation of powers to which we have aleady called attention, there would be at least a possibility that when he read Montesquieu and Wilson, Jefferson had not yet formulated in his mind the two theories which were to be the pillars of his policies.

If the entry was made after July 1776 we may assume that Jefferson, finding in Wilson something he had already said himself in a more concise and more striking form, did not believe it was worth his time and paper to copy the passage.

We are quite ready to confess that neither of the two explanations is really satisfactory (1).

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(1) The problem becomes even more complicated when one remembers the language of the *Declaration of rights*, drafted by George Mason

The debate might be prolonged almost indefinitely without reaching any conclusion, or without adding much to the statement made by Jefferson himself in a letter written to Henry Lee :

> *Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind... All its authority rests on the harmonizing sentiments of the day, whether expressed in conversation, in letters, in printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.* (*M. E.*, *XVI*, 117.)

On one last point I would agree entirely with Mr. Becker : the influence of Rousseau was absolutely negative, nor does it appear that at any time of his life Jefferson paid any attention to the *Contrat Social*, which is not even found in the manuscript catalogue of his library. The ultimate source of ideas which were proclaimed « undeniable and self-evident » is after all of little significance. Whatever their origin may have been, they had become an integral part of the American mind, and it remained for an American to give them their definitive and final expression.

Article 833 throws an interesting light on Jefferson's ideas of values. He quotes from Harris : *Essay on money and coins*, London, 1756, to the effect that

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and presented to the Virginia Convention by Archibald Carey, May 27, 1776. But the resemblance between the text of Wilson, the text of Mason, and the text of Jefferson does not explain the omission of the most essential paragraph in the abstract.

« the values of land and labour do, as it were of themselves mutually settle or adjust one another », and from Postlethwayt's *Universal dictionary of trade and commerce*, London, 1751. This last quotation he used later (*To John W. Eppes, November* 6, 1813, *M. E ., XIII*, 414), in an attempt to refute the theories of Adam Smith.

Article 834 is an extract from the *Parliamentary Register* of 1775, concerning the first hostilities of « the late war between the French and the British ».

Articles 835-836 are abstracts from the *Mémoires de l'Amérique*, on the early boundaries and charters of Carolina and Georgia, and is probably faken from *Mémoires des Commissaires du roi et de sa Majesté Britannique sur les possessions des deux couronnes en Amérique*. Paris, 4 vols., 1755-57.

Article 835 quotes directly from the charter of Maryland.

Article 837, purely legal, explains from the *Institutes* the differences between a fine and an amercement.

WILLIAM EDEN

Jefferson made a thorough study of William Eden's *Principles of Penal Law*, published in London in 1772. Eden had plainly been influenced by Montesquieu and Beccaria, and it seems that Jefferson remembered him when he drew up the *Bill for* *proportioning Crimes and Punishments.* (see ♯ 839, note).

It is remarkable however that Jefferson did not mention the name of Eden in the foot-notes of the bill, and that he did not even use the same authorities in discussing cases similar to those treated by the English commentator (see ♯ 845, note).

Jefferson was to meet Eden in Paris. When he heard of the English jurist's appointment as ambassador to Spain, he wrote to John Jay :

Mr. Eden is appointed Ambassador from England to Madrid. To the hatred borne us by his court and country, is added a recollection of the circumstances of the unsuccessful embassy to America, of which he made a part. So that I think he will carry to Madrid dispositions to do us all the ill he can (June 21, 1787, *M. E., VI*, 141).

A few months later he had with Eden several conversations, which did not change his opinion of him :

« *We had often before had occasions of knowing each other : his peculiar bitterness towards us had sufficiently appeared, and I had never concealed from him, that I considered the British as our natural enemies, and as the only nation on earth who wished us ill from the bottom of their souls* » *(To William Carmichael, December* 11, 1787, *M. E., VI*, 379).

Article 846 is a brief account of circumstances relating to the foundation of Pennsylvania, from

W. Guthrie's *Geographical, Historical and Commercial Grammar*, 1770.

Article 847 is a definition of the right of majorities taken from Puffendorf : *De officiis...* and completed with Brocton and Hakewill, *The manner how statutes are enacted by Parliament*, 1641.

Article 848 takes us back to the origin of hereditary estates, and is taken from Vallancey : *Collecteana de rebus Hibernicis*, N° III, published in Dublin, 1774. It contains a definition of *gavelkind*, which Jefferson will discuss again much more elaborately in # 870.

Helvétius

Articles 849 to 852, taken from Helvétius *De l'Homme*, contain a long discussion on the nature of the soul, which Jefferson quoted later (see note to # 849). No certain date can be ascribed to these entries, although the evidence available seems to indicate that they were made before Jefferson went to France. It would take many pages to discuss here Jefferson's theories on immortality and the soul. The indications found in his correspondance are so contradictory that the subject will probably ever remain a subject for controversy. It may be noted however that Jefferson reproduced in the *Commonplace Book* the passages in which Helvétius protested against the accusation of atheism, and that he manifested a distrust for theology very similar to the one shown by the author of *De l'Homme.*

The last abstract from Helvétius is of an entirely different nature, and brings us back to the subject of federative republics. The conception of Helvétius is almost prophetic and resembles closely the one advocated by Jefferson and finally adopted by the United States. Here again the influence is not certain, although the consonance and harmony of the views of the two authors are undeniable.

VOLTAIRE

Jefferson had already quoted Voltaire incidentally in the *Commonplace Book*, but undertook a more systematic survey of *L'Essai sur les Mœurs*, and made no less than 10 consecutive entries from it (852-862). Their interest is almost negligeable if we except the article on persecutions directed against the editors of l'*Encyclopédie.* A study of Jefferson's correspondence fails to reveal that Voltaire had made any lasting impression upon his mind, nor even that he had read him to any considerable extent. From *L'Essai sur les Mœurs* and *Le Siècle de Louis XIV* he collected a large number of precise facts, using Voltaire as a sort of dictionary of inventions, but never paying any attention to his ideas, nor even hinting that Voltaire had ever expressed any ideas at all. The only mention of Voltaire found in the published works is a discussion of the well-known and ridiculous theory of the French « philosophe » on fossils (*Notes on Virginia, Query VI,* *M. E., II,* 43 ; *Miscellaneous papers, travel in Touraine, M. E., XVII,* 233).

Another « extract from Voltaire's *History of the Age of Lewis XIV* », given here in the Appendix, refers to the introduction into France of « useful manufactures ».

It is also quite remarkable that although John Adams, in his letters to Jefferson, mentioned several times and always in a derogatory manner the name of Voltaire, his correspondent seems never to have paid the slightest attention even to the attacks directed against the French philosopher. As far as the evidence at hand permits us to draw a conclusion, it may be said that the most famous writer of the eighteenth century had little influence upon Jefferson.

In the articles on Voltaire, Jefferson inserted a short item taken from Buffon (Paris, edition, 1764), and « Douglas, *America* », probably William Douglass : *A summary, historical and political of the first planting... and present state of the British Settlements in North America,* Boston, 1747-1749.

Articles 862, 863 and 864 deal with matters loosely connected : the first being on the origin of the calendar ; the second on the election of bishops and the third on the « Apostolic constitution ».

Article 865 is a philosophical definition in Latin, on a point of logic. I have been unable to find its source.

Article 866 a discussion of « trespass ».

Article 867 contains a tabulation of « Methods of removing causes from County to Superior Courts », established by Jefferson.

Article 868 is purely legal and deals with the definition of *secta* or *suit* after Fortescue.

Article 869 begins a discussion on the origin of the Common law from Fortescue, *De Laudibus legum Angliæ*, which continues in 870 and is interrupted in 871 by a short digression on the origin of the English *th*, to be resumed in 871.

Articles 873 and 879 deal with the history of the Common law, and constitute the extract from the *Commonplace Book* which Jefferson sent to Cooper and which has been printed in his collected works.

Articles 874 and 875 are taken from John Taylor's *Elements of the Civil Law*, London, 1755 ; the first deals with the etymology of *Gafael* or *Gavel* ; the second shows the affinity of several dialects of the old British.

Articles 876 and 877 are purely legal and are taken from the old treatise of Saint-Germain, *Doctor and Student*, first written in Latin and many times reprinted in English.

Article 878 is a long discussion on the origin of the calendar compiled by Jefferson from many authorities.

Article 880 is a definition of the « Lex Romana » *de seditiosis*, « under which Jesus is said to have been crucified ».

Article 881 is taken from Livy and deals with the introduction of foreign cults that threatened to supersede the old religion of Rome.

Articles 882 to 901 are taken from Blackstone's *Reports*, published in 1781, one year after the death of the English jurist. They have no special import except as evidence that Jefferson kept up his reading of lawpublications long after he had left the profession.

Article 901 begins with a long quotation from Robinson's *Reports of cases argued and determined in the High Court of Admiralty* ; *commencing with the Judgments of the Right Honorable Sir William Scott*, published in 1800. After it comes a discussion, by Jefferson, of the decisions of the English judge, but there is no indication which would permit us to give an exact date to the extract, which may have been written by Jefferson any time after 1800. Article 902 is a resumé of Robinson without any comment ; the same is true of article 903, in which Jefferson has simply reproduced

Robinson, omitting the last three pages of the report on the case of the *Flad Oyen.*

Article 904 reproduces Tertullian's definition of God and the soul from Holbach's *Tableau des Saints,* London, 1770.

Article 905, which is the last, is a collection of the « heresies » of Hume on popular sovereignty, and ends with a quotation from *The Globe* dated March 24, 1824. As many references to Hume are found in Jefferson's correspondence and as Hume was one of Jefferson's favorite « ennemies » it cannot be supposed that he waited until that date to read the English philosopher. The « specimens of Hume's political principles » are selected with a clearly ironical intent. Even in his old age and on the threshold of death Jefferson had not lost any of his faculty of indignation against the detractors of popular sovereignty.

IV

CONCLUSION

Such as it is, the *Commonplace Book* may well be considered as the most important document available for the study of the historical and political background of Jefferson at the time he wrote the Declaration of Independence. It does not represent

Jefferson's complete range of reading, and it will be noticed that purely literary and philosophical matters receive little attention in it. The extracts he made from Greek, Latin, English and French poets and from ancient and modern philosophers he set down in a smaller book kept in the Library of Congress, which will shortly be the subject of another publication. Not until then will it be possible to obtain a real insight into the mind of the most discussed statesman of the earlier period of the United States. In the meantime the *Commonplace Book* will enable one to reach at least provisional conclusions on the origin of some of the ideas which constituted the mainstays of Jefferson's political system. It will help at any rate to disprove the popular conception that Jefferson was fundamentally an a-priorist who too often indulged in hasty generalizations. Whatever may be the value of his political philosophy, he did not come to it through a sudden revelation; had he cared to do it he would have been able in order to support his views, to quote from a long list of authorities. The doctrine of natural rights was enunciated after a long and painstaking investigation of the customs and ways of living of the early populations of Europe. The theory of federative government was the result of his study of the constitutions of the Greek cities, of the Union of Utrecht, the Swiss confederation, the Dutch states and the elective monarchies of Northern Europe. The bills to abolish entails and primogeniture and to proclaim religious freedom were intended to do away with abuses and usurpations whose origin and development Jefferson had previously traced historically. Were it possible to discover similar documents for George Mason, George Wythe, John Adams, James Wilson and many others, it would become evident that the amount of information used by of the « founders » was far greater than is generally recognized.

It is remarkable that in a book of this character, political philosophers occupy so little space. Neither Hooker, Hobbes, nor Rousseau are even mentioned. Locke, Jefferson knew and studied separately, as can be seen from the extracts published here in the appendix, but it is very doubtful whether he was greatly influenced by him. It is perfectly true that the theories expressed in the *Treatises on Government* permeated the political philosophy of the English writers during the eighteenth century, and that the ultimate source of many of Jefferson's ideas can be traced back to Locke. But, as a matter of fact, the English philosophers were not directly quoted by the American Insurgents so often as one would believe, and this apparent neglect can easily be explained. The theory of popular sovereignty which after all constituted the essential doctrine of Locke, had been developed and accepted by so many other writers after him that it was no longer necessary to quote any authority to support a « self-evident truth ». Moreover, the members of the Continental Congress, the signers of the Declaration of Independence, and the makers of the Constitution were not in any degree vague theorists interested in abstract ideas and principles. Theirs was the legal more than the philosophical mind ; they were anxious to prove their case by historical and legal precedents, and gathered information with a precise object in view, not for the sake of playing with ideas. First of all, they had to demonstrate to their own and to the people's satisfaction that they had the right to sever the bonds which still connected them with the mother-country, and to set up an independent form of government. This was evidently one of the purposes Jefferson had in mind when he compiled the *Commonplace Book.* Properly speaking, there is no unity in the notes that he took while reading the *Institutes* and the technical treatises on law which he had accumulated in his library ; the same subject is treated several times in different places, from different points of view, and on the authority of different writers. There is however, running all through the manuscript, a certain trend of thought which reappears with striking regularity, and is manifest in the choice of many extracts. It is a typically eighteenth-century theory and throws a rather new light on the mind and the political theories of Jefferson.

Though he was little of a dreamer, Jefferson, like so many men of his time, had a vision of a Golden Age. He was not enough of a utopian to place it in a hypothetical « state of nature », and abstract « man » presented no interest for him. On the other hand, he was too well acquainted with the American Red Men to indulge in the delusion of so many French and English writers regarding the « noble savage ». But his readings convinced him that it had been possible, at a time which was not buried in a mythological past, for a certain people to live under customs and unwritten laws based upon the natural rights of man, and permitting the individual to develop freely, normally and happily. In the course of time these free institutions had deteriorated through the nefarious influences of several agencies. Unwritten law became written law and jurists succeeded in concealing under their sophistry and verbiage the primitive intent of natural legislation. Priests, striving to extend their domination over a realm which primitively was foreign to them, had introduced religious prescriptions into civil laws and thus diminished the rights of the individual. Conquerors and a long lineage of hereditary kings had further modified primitive institutions in order to provide an apparently legal foundation for their usurpations, until the people, no longer able to withstand patiently the evils of tyranny, had arisen and recovered at least some of their rights.

Such a conspectus of the history of England was neither new nor original : it was one of the favorite contentions of English jurists during the eighteenth century, and nowhere perhaps is it more forcibly developed than in the last chapter of Blackstone's *Commentaries, Of the rise, progress and gradual improvements of the laws of England.* It is fundamentally also the doctrine of Jefferson, who went much farther than any of the English political thinkers in his revendication of the Saxon liberties.

It appears in one of his earliest and most fervid productions, *The Rights of British America.* There he remonstrated to his Majesty :

« That our ancestors, before their emigration to America were the free inhabitants of the British Domi-

nions in Europe, and possessed a right, which nature has given to all men of departing from the country in which chance, not choice, had placed them, of going in quest of new habitations ,and of there establishing new societies, under such laws and regulations as, to them, shall seem most likely to promote public happiness.

That their Saxon ancestors had, under this universal Law, in like manner, left their native wilds and woods in the North of Europe, had possessed themselves of the Island of Britain, then less charged with inhabitants, and had established there a system of laws which has been so long the glory and protection of that country. »

This was the conclusion Jefferson had reached after reading Pelloutier, Dalrymple, Sullivan, Lord Kames and Sir William Temple, and which made him agree with the saying he reproduced at the beginning of article 754 : « *that all Europe was beholden to the Northern nations for introducing or restoring a constitution of government far excelling all others that we know in the world* ».

What the English people had partly succeeded in doing remained for the Americains to perfect, namely, to restore in their integrity the principles of their « Saxon ancestors ». This is undoubtedly the historical background of the *Bill for religious freedom.* It was not in any way comparable to the measures taken against the Church by the men of the French Revolution ; it was not inspired by any animus hostile to any form of religion, it was simply the protest of a legalistic mind convinced that the privileges enjoyed by the Church in the State of Virginia rested upon an unsound foundation. In

Sullivan, Jefferson had learned that in the infancy of the Church the clergy was supported by voluntary contributions of the people and that it was not until the fourth century that *Tythes* began to be preached up by the clergy (♯ 769). This admission was the more valuable since it was found in an author who « shewed himself to have imbibed principles very unfriendly to the rights of mankind and favorable to the pretended divine rights of the king and clergy » (767 *in fine*). His study of the origin of the Common law had demonstrated to him conclusively that « the incorporation of the four chapters of the Jewish laws into the laws of Alfred was nothing but an awkward monkish fabrication ». And it was only after the most painstaking historical investigation that he pronounced that « In answer to Fortescue Aland's question why the ten commandments should be now be a part of the common law of England ? we may say they are not, because they never were made so by legislative authority, the document which has imposed that doubt on him being a manifest forgery » (♯ 879, *in fine*). Whatever Jefferson's religious tenets may have been at the time, it does not seem that he was impelled by any hostility to the Church or influenced by any Voltairian consideration. There is evidence enough that he found in Locke several of the arguments incorporated in the *Bill for religious freedom* ; and he recognized that « it was a great thing to go so far », but he also considered that Locke had not gone far enough and had not analyzed the fundamentals of the problems, and decided that « where he stopped short, we may go on ». The *Bill for reli-*

gious freedom does not find its justification in the doctrine of civil rights as in Locke, but in the principle of natural rights, and Jefferson had certainly in mind the pristine purity of Saxon institutions and *folc-right* when he proclaimed « that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right » (*Bill for religious freedom*).

The same considerations would apply even more aptly to the *Law of descents*, which proposed to go back to the condition which prevailed among the Anglo-Saxons before their institutions were spoiled by the feudal system, and we see in the *Proposed Virginia Constitution* that « Descents shall go according to the law of Gavelkind save only that females shall have equal rights with males » *(Ford edition, II,* 26, *June* 1776*)*.

It is equally true of the *Law to abolish entails*, which can be studied in the light of the long extracts in the *Commonplace Book* on the establishment and development of the feudal system in England.

Thus, three of the four measures advocated by Jefferson to establish a new order and a new system of government can be traced back directly to a Saxon origin.

« *I considered* », *said he in his Autobiography*, « *four of those bills... as forming a system by which every fibre would be eradicated of ancient or future aristocracy* ; *and a foundation laid for a government truly republican. The repeal of the law of entails would prevent the accumulation and perpetuation of wealth* *in select families... The abolition of primogeniture and equal partition of inheritances removed the feudal and unnatural distinctions... substituting equal partition, the best of all Agrarian laws. The restoration of the rights of conscience relieved the people from taxation for the support of a religion not theirs...* »

The fourth measure, the *Bill for a general education*, was simply the corollary of the three other laws and was intended to consolidate what they established.

When, almost at the end of his life, Jefferson wrote to Major Cartwright to congratulate him on the publication of the *History of the English Constitution*, he sounded once more the same note as in the *Rights of British America* :

« *Having driven out the former inhabitants of that part of the island called England, they became aborigenes as to you, and your lineal ancestors. They doubtless had a constitution ; and although they have not left it in a written formula, to the precise text of which you may always appeal, yet they have left fragments of their history and laws, from which it may be inferred with considerable certainty... And although this constitution was violated and set at naught by Norman force, yet force cannot change right. A perpetual claim was kept up by the nation, by their perpetual demand of a restoration of their Saxon laws ; which shows they were never relinquished by the will of the nation. In the pullings and haulings for these ancient rights, between the nation, and its kings of the races of Plantagenets, Tudors and Stuarts, there was sometimes gain, and sometines loss, until the final reconquest of their rights from the Stuarts. The destruction and expulsion of this race broke the thread of* *pretended inheritance, extinguished all regal usurpations, and the nation re-entered into all its rights ; and although in their bill of rights they specifically reclaimed some only, yet the omission of the others was no renunciation of the right to assume their exercise also, whenever occasion should occur. The new King received no rights or powers, but those expressly granted to him. It has ever appeared to me, that the difference between the Whig and the Tory of England is, that the whig deduces his rights from the Anglo-Saxon source, and the Tory from the Norman. (June* 5, 1824, *M. E., XVI,* 43*).*

Jefferson was too practical of mind to wish to go back to the living conditions of the « Saxon ancestors ». He was also too much of a real American not to claim for his country the full credit of instituting a new form of government, and in the same letter he hastened to declare that : « While the English people had to accept some of the inheritance of the past, our Revolution, commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry ». Fifty years after the signing of the Declaration of Independence he seems to have forgotten that he, as well as several of his contemporaries, had searched the records of the past before setting out to establish a new form of government. Thus he became in part responsible for the creation of the legend which represents the American Constitution as an inspired and almost miraculous document. And yet his fondness for his « Saxon ancestors » was such that immediately after proclaiming that the Americans had nothing before them but the blank page of an album, he indicated that among the professorships of the University of Virginia there would be one of Anglo-Saxon : « As the histories and laws left us in that type and dialect, must be the text-books of the reading of the learners, they will imbibe with the language their free principles of government ».

Such was probably the source of his zeal in advocating the study of Anglo-Saxon, one of those « hobbies which too often runs away with me where I meant not to give up the rein » *(To Denison, Nov.* 9, 1825, *M. E., XVI*, 135*)*. On this particular point, his views on the right of the American people to diverge from the English custom and use bear a striking similarity to his views on government. For them he claimed the right to enlarge their language « to make it answer its purpose of expressing all ideas, the new as well as the old », and to constitute « an American dialect » *(To John Waldo, Aug.* 16, 1813 *M. E., XIII*, 338*)*. But at the same time he encouraged the printing of Anglo-Saxon grammars and vocabularies to facilitate the study of the old language ; for, as he said, « Such works as these with new editions of the Saxon writings, on the plan I venture to propose, would show that the Anglo-Saxon is really old English... They would recruit and renovate the vigor of the English language, too much impaired by the neglect of its ancient constitution and dialects, and would remove, for the student the principal difficulties of ascending to the source of the English language » *(Essay on Anglo-Saxon, M. E., XVIII,* 321*)*.

The idea that Jefferson had been influenced more than any other American of his generation by European and particularly by French thought has so long been accepted both by his friends and his enemies that we have not come to a different conclusion without some misgivings. His dislike of England and of English things, with the sympathy he expressed for France on many occasions, may have led to the belief that he was gallicised and ready to accept without examination the theories of the French philosophers. As a matter of fact, such an influence, if it really existed, was limited and should be studied historically. He went to Europe as a student eager to learn and to bring back to his country all the useful information he could gather, but during the earlier period of his life he found in the French books he read, more facts than new ideas, and certainly no new system of philosophy. Voltaire was to him a repertory of facts, a dictionary of inventions rather than a thinker. There was nothing in Rousseau which he could not find expressed in a much more logical and plausible way in Lord Kames. However he was impressed by at least two theories of Helvétius, and the real influence that Montesquieu exerted on him during a certain period of his life cannot be denied. He found in him sharply coined formulas, axioms and definitions which were to remain in his mind long after he had recanted and denounced the « heresies » of l'*Esprit des Lois*. But he always manifested more esteem for the savants of the type of Buffon and Lacépède than for the real « philosophes » and was never attracted by their theorizing.

In spite of his personal friendship and in spite of his cosmopolitan reading, Jefferson was above all intensely but not narrowly American. The English origin of the colonies was a fact which he had to accept much as he disliked it ; but early in his career he decided that America should develop independently from the old world and restore the Saxon polity interrupted by centuries of tyranny and usurpations. From the English tradition he was ready to receive the Saxon principles which had survived in the Common law, and the great mission of the American people was to continue in the steps, not of the British, but of their « Saxon ancestors » ; and to establish on the new continent a system which would combine « the double blessing of liberty and order ».

It was Jefferson's favorite contention in his later years that the Americans had set up an entirely new form of government in the days of the Revolution ; he even took a particular pleasure in proclaiming : « it is our glory that we first put the ball of liberty into motion and our happiness that, being foremost, we had no bad examples to follow ». The *Commonplace Book* contains nevertheless ample evidence that he was not averse to digging into « the musty records of the past ». He had investigated with particular care the functioning of the federative system of government in ancient Greece and modern Europe ; he had looked for historical confirmation of the doctrine of natural rights ; he had painstakingly collected every scrap of evidence to reconstruct the history of his « Saxon ancestors », and he remained firmly convinced that his conception of liberty and natural rights had been put into effect by the « semi-barbarous » tribes whose wanderings he had traced through Pelloutier, Molesworth, Vertot, Sullivan, Kames and Blackstone during the studious years of his youth.

GILBERT CHINARD.

Johns Hopkins University, December 1925.

THE COMMONPLACE BOOK

As indicated in the Introduction, *p.* 14, *the articles dealing exclusively with legal matters are printed by title only.*

Editor's Note.

1. Void, meaning of. *Andrews 82* (1).

2. Error. *F. N. B. 21, F. 1. Roll. tit Error I Vent., 316. I. Ray. 760, 2.*

3. Witness related to one of the parties. *Andrews 86.*

4. Error, writ of. *Andrews 85, 104, Cro. Jac. 551, Dyer, 313 a 2, Raym, 1364, Salk, 152, Co. L. 158 a, Theb. 740, 19, H 8, pl. 6, Co. L. 157 a.*

5. By-law, necessity an excuse for breach of. *Andrews 98.*

6. *And* construed as *or*. *Andrews 285*, etc.

7. Error and judgment affirmed. *Andrews 113.*

8. Law, remedial. *Andrews 116, 119.*

9. Court, inferior. *Andrews 140.*

10. Figures, Roman, use of. *Andrews, 137.*

11. Remitters not to be considered as contingent. *Andrews 135.*

12. Entry, actual. *Andrews 136.*

13. Costs, *Statutes relative to costs are 3 H, 7, c. 10, 13, c. 2, sess. 2, c. 2, 16, 17., c. 2, c. 6.*

14. Modus intrandi. *Andrews 157.*

15. Demand, on a deed. *Andrews 158.*

16. Case against the law. *Andrews 165.*

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(1) G. Andrews, *Reports of cases origined before the King's Bench during the* 11th, 12th *and* 13th *years of the reign of George II*, 1737-1740. Folio edition, 1754.

17. Officer, de facto. *Various statutes.*

18. Bishop, de facto. *Cr. El. 699.*

19. Note, promissory. *Salked 442 et cet.*

20. Wills, descriptions in. *Andrews 207.*

21. Estate, meaning of. *Andrews 204.*

22. Libel. *Andrews 228.*

23. Trial at bar. *Andrews 272.*

24. Protection to counsels. *Andrews 276.*

25. Assumpsit. *Andrews 277.*

26. Witnesses, two. *Andrews 302.* Lee C. J. denied 2. Lev. *142.* S. C. *3* Heb. *422*, *460*, *494*, *539* to be law.

27. *Andrews 314.*

28. Devises, executory. *Andrews*, *333.*

29. Memoriæ, man de non sanæ. *3.*

29. If a man commit treason or felony and confesseth the same, or be thereof otherwise convict if afterward he become de non san memoriæ he shallæ not be called to answer: or if after judgment he become de non sanœ memoriæ he shall not be executed, for it cannot be an example to others. *3. Inst. 4* (1).

30. If any levy war to expel strangers, deliver men out of prison, remove counsellors, or against any statute, or to any other end, pretending reformation of their own heads, without warrant, this is a levying war against the king, because they take upon them royal authority; and therefore treason. *3. Inst. 9.*

31. There is a diversity between levying a war and committing a riot. For example if three or four, or more rise to pull down an inclosure in Dale which the lord of the manor hath erected there, this is a riot and no treason, but if they had risen to alter religion, or laws, or to go from town to town generally and cast down inclosures this is a levying war, though there be no great number of conspirators, within the purvieu of this statute; because the pretence is publick and general, and not private in particular. *3. Inst. 9.*

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(1) *The Third Part of the Institutes of the Laws of England, Concerning high treason, etc. Authore Edw. Coke, Milite* London 1671. Id. *The Fourth part.*

32. Bradshaw and Burton and others agreed to assemble themselves at Enslowe hill and thence to go from gentleman's house to gentleman's house and to cast down enclosures as well for enlargement of highways as of errable lands; and to get armor at the lord Norris's house and wear them for that purpose: and all this was confessed by the offenders and resolved *39* El. that this was a compassing and intention to levy war against the queen, because the pretence was publick within the stat. *13* El. C. l, and the offenders were attainted and executed. *3. Inst. 10* (1).

33. Resolved that an insurrection against the stat. of labourers was a levying war against the king because it was generally against his law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do. *3. Inst. 10.*

34. Treasons done upon the sea shall be tried in such shires of the realm as shall be limited by the king's commission, in like form as if it had been done on land. *3. Inst. 10.*

35. For a treason done in Ireland the offender may be tried by *35* H. *8.* c. *23*, in England: because the words of the stat. be « all treasons committed out of the realm of England » and Ireland is out of the realm of England. See Orurke's case cited *7.* Co. *23.* a. and *11.* Co. *63.* a. *3. Inst. 11.*

36. A man slain in open rebellion can no way be punished, or forfeit any thing, because he cannot be attainted. *3. Inst. 12.*

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(1) The subjects treated in the following articles, were dealt with again much more extensively in the notes to the *Bill for proportioning Crimes and Punishments.* If Jefferson used his *Commonplace book* at all in that instance, he completed his documentation and carried his investigation of legal authorities much farther than he had previously done.

37. If a man be arraigned upon an indictment of high treason, and stand mute, he shall have such judgment, and incur such forfeiture as if he had been convicted by verdict, but otherwise it is in case of petit treason, murder, or other felony. *3. Inst. 14.*

38. Bare words may not make a traytor without an overt act, but words without an overt deed are to be punished as an high misprision. *3.* Inst. *14.* but this opinion is denied to be law. *Keil. 13.* See also Crohagen's case *Cro. Car. 332.* contr. see post. *222.*

39. If a man take wax lawfully imprinted with the great seal from a patent, and fix it to a writing purporting a grant from the king, it is not a counterfeiting the great seal within *25* E. *3.* c. *2.* and therefore not high treason. See several cases cited *3. Inst. 15. 16.*

40. When a woman commits high treason and is quick with child, she cannot plead it on her arraignment, or alledge it in arrest of judgment, but judgment shall be given against her : and if it be found by a jury of matrons that she is quick with child (for privement enseint will not serve) it shall respite execution until delivery, and she shall this benefit but once, though again pregnant. *3. Ins.*

41. In high treason there can be no accessories, as there may in petit treason, or murder, but all are principals. and whatsoever act will make a man an accessory in felonies, will make him a principal in high treason. *3. Inst. 20, 21.*

42. Whensoever felony is made by any statute, and the benefit of clergy is not expressly taken away, the offender shall have his clergy. *3. Inst. 39.*

43. 1. Jac. c. *12.* makes it felony without benefit of clergy to « practise any invocation of any evil spirit, or to take up any dead body, or the skin, bone or any other part of the dead body, from the place where it resteth to be used in any manner of witchcraft». Also «if any person take upon him by witchcraft to tell in what place any treasure, or goods lost, might be found, or to hurt or destroy any person in his or her body, altho' the same be not effected, he shall on conviction » for the first offence suffer a year's imprisonment without bail or mainprise, and once every quarter of the year stand six hours on the pillory in some market town and there confess his offence: and on the second offence it is felony; but with a saving of dower to the widow and the inheritance to the heir, and their other rights, as though no such attainder of the ancestor had been. *3. Inst. 45, 46, 47.*

44. My Lord Coke defines MURDER to be « when a man of sound memory and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum naturâ under the king's peace, with malice forethought either expressed by the party or implied by law, so as the party wounded or hurt etc. die of the wound or hurt etc. within a year and a day of the same. *3. Inst. 47.*

45. If a woman be quick with child, and by any potion or otherwise killeth it in her womb; or if a man beat her whereby the child dies in her body and she is delivered of a dead child this is a great misprision, and no murder: but if the child be born alive and dieth of the potion, battery etc., this is murder. *3. Inst. 50.* and 1. E. *3.* fol. *24.* b. and. *3.* Ass. pl. *2* contra said never to have been holden for law.

46. A felo de se, whatsoever offence he hath committed, shall forfeit his goods and chattels only; for no man can forfeit his lands without an attainder by due course of law. *3. Inst. 55.*

47. Every entry into a house by a trespasser is a breaking in law: as if the door of a mansion house be open, and the theif (*sic*) enter with a purpose to steal, this is a breaking in law. But in cases of burglary, an actual breaking is necessary, if the window of a house be open, and a thief with a hook draw out some of the goods of the owner, it is not burglary: but otherwise if he break the window, when a theif (*sic*) has broke the house, an entry of any part of his body, or of a gun, or hook, into the hole which he hath made with an intent to steal or kill, is such an entry as will constitute burglary, those who watch while others commit the burglary, are principals. *3. Inst. 64.* Burglary may be committed in the outset houses, such as barns, stables, cowhouses, dairies, etc. for all are parts of the mansion house and will pass under that name, if by accident the whole family be out of the house when it is broke, it is burglary ; for the indictment is, *domum mansionalem, etc., fregit et intravit. 3. Inst., 64, 65.* The intent, of committing felony suffices.

48. In arson, the offender is not ousted of his clergy but where he burns some part of a mansion house, or a barn with corn. The burning any part of the house, tho' the whole is not consumed, is sufficient. *3. Inst. 67.*

49. Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or any goods of any value whatsoever. The putting in fear maketh the difference between a robber and a cut-purse. *3. Inst. 68.*

50. Larceny is, by the common law, the felonious and fraudulent taking and carrying away by any man or woman, of the meer personal goods of another, neither from the person, nor by night in the house of the owner, grand larceny is where the goods stolen are of the value of twelve pence ; petty larceny, where they are below that, and for this the offender shall forfeit all his goods, and suffer some corporal punishment, as whipping, etc. *3. Inst. 107. 109.*

51. A man hath a meer property in some things, tame by nature, and yet on account of the baseness of their nature no larceny can be committed by stealing them : such are mastiffs, hounds, other dogs, or cats. The law is the same with respect to some things wild by nature, and afterwards tamed : such are bears, foxes, apes, monkies, poll-cats, ferrets, etc., as also their whelps, calves, or young. On the other hand, some things, ferae natura, reclaimed, may be the subject of felony on account of their noble and generous nature and courage, serving *ob vitæ solatium* of princes, and of noble persons, to make them fitter for great emploiments. such are faulcons. *3. Inst. 109. post. 202.*

52. Larceny may be committed of such *feræ natura*, as when tamed serve for the food of man : as also of their flesh, when, being before wild, they are killed, such are deer, wild boars, conies, cranes, pheasants, partridges, or the like. So note the diversity between such ferae natura, reclaimed, as serve for pleasure only (of which no larceny can be committed) and such as serve for food. *3. Inst. 110, post. 202.*

53. If a man be present when one is murdered or robbed, and doth not endeavor to attack the offender, nor levy hue and cry, he shall be imprisoned and fined. *3. Inst. 117.*

54. When hue and cry is levied upon any person, the arrest of such person is lawful, altho' the cause of such hue and cry be feigned ; and if the case be feigned, he that levy the same shall also be arrested, and shall be fined and imprisoned, but common fame is not sufficient to arrest a man in case of felony, unless a felony be actually done. *3. Inst. 116.*

55. Misprision of felony is where one knows of the commission of a felony and does not discover it : and is punishable by fine and imprisonment. Theftbote is when the owner not only knows of the felony, but taketh of the theif his goods again, or amends for the same, not to prosecute him, to the intent he may escape : and is punishable by ransom and imprisonment. In this case if he receive the theif himself, and aid him in his felony, he is accessory to the felony. so note the diversity quando proprietarius recepit latrocinium, et quando latronem. *3. Inst. 134.*

56. Misprision is two-fold : *crimen omissionis*, as not discovering treason or felony ; and *crimen commissionis*, as in committing some heinous offence under the degree of felony. *3. Inst. 139.*

57. Conspiracy is an agreement between two or more to appeal or indict an innocent falsely and malitiously of felony, who is accordingly indicted and acquitted. The party injured may recover his damages by a writ of conspiracy : and the offender may also be indicted at the suit of the king : the effect of the judgment on this indictment is that he lose the freedom of the law ; if he hath anything to do in the king's court he shall come in broad day, make his attorney, and return by broad day ; and his houses, lands, and goods shall be seised into the king's hands, estrepped, wasted, his trees rooted up, and his body to prison. 3. *Inst.* 140.

58. The difference between bribery and extortion is that bribery is only commited by him who hath a judicial place ; but extortion may be committed by him who hath a judicial place and by him who hath a ministerial office. 3. *Inst.* 147.

59. Acts of parliament which are for the good of the commonwealth, and in which all the king's (1) subjects have an interest, the king cannot dispense with by *non obstante* : but where a statute prohibiteth anything upon a penalty, which is given to the king alone, or to the king and the informer, the king may dispense with the penalty. 3. *Inst.* 154.

60. Affray. *3. Inst. 158.*

61. Perjury. *5. El. c. 9.*

62. Opinion reported by Dier, *12* El. fo. *288. 3. Inst. 170.*

63. Trial by battle. *3. Inst. 212.*

64. Judges, English, jurisdiction of. *3. Inst. 223.*

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(1) Lane v. Cotton, 1. Ray. 658. *Note of Jefferson.*

65. Killing an escaping offender. *3. Inst. 221 and. 227.*

66. Inventory of the goods of an offender. *3. Inst. 229.*

67. Judgment, void. *3. Inst. 231.*

68. Presumption, false, of murder. *3. Inst. 232.*

69. And, meaning of. *2. Inst. 110.*

70. Statute versus common law. *2. Inst. 200.*

71. Writs of mort-dancester, cosinage, etc. *2. Inst. 245.*

72. Warranty in deeds of *dedi et concessi. 2. Inst. 275.*

73. Damages. *2. Inst. 288, 289.*

74. Assets descending from the ancestor. *2. Inst. 293.*

75. Champerty, *2. Inst. 564.*

76. Election of knight, *4. Inst. 47, 48.*

77. Admiralty, jurisdiction of court of. *4. Inst. 136, 137, 140, 141.*

78. Entry, forcible. *4. Inst. 176.*

79. Scire facias. *Salk. 2. 2. Ray. 852* (*1*)

80. Civil actions, defender joined in. *Salk. 3.*

81. Names, identity of, father and son. *1, Salk. 7.*

82. Habeas corpus, removing a cause by. *1, Salk. 8.*

83. Assault and battery in trespass. *1, Salk, 11*; *1 Ray. 339, 692.*

84. Civil action without grounds. *1. Salk. 13, 1*; *Ray. 374.*

85. Court divided. *1. Salk. 15.*

86. Bailment. *1. Raym. 655.*

87. Lease. *1. Salk. 19.*

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(1) William Salked, *Reports of the cases in the king's Bench*, 1689–1712, London 1717–1718.

Robert Raymond, *Reports of cases argued and adjuged in the Courts of King's Bench and Common Pleas, in the reigns of the late king William, Queen Anne. King George I, and his present Majesty*, 2 vols. London, 1743 and 1765.

88. Mistake, money paid by. 3. *Salk. 22.*

89. Debt, indebitatus assumpsit in no case but where debt lies. *1. Salk. 23.*

90. Jacob and Mills case Hob. *1* denied to be law. *1. Salk. 11.*

91. Debt, delivery as evidence of. *2. Raym. 155.*

92. Bailments, six sorts of. *2. R. Raym. 909*; *1. Salk. 26.*

93. Promise, collateral. *1. Salk. 27. 2. Ray. 1085.*

94. Informer, common. *1. Salk. 3.*

95. Opinion 9 Co. 36 denied by the court. *1. Salk. 37.*

96. Gage case said by Holt C. J. et alii not law. *1 Salk. 53.*

97. Turks and Infidels, perpetui inimici, groundless. *1. Salk. 46.*

98. Debts. *1. Salk. 65* ; *1. Ray. 360.*

99. Apprentice. *1. Salk. 68. 1. Ray. 683.*

100. Award giving a new duty in lieu of the old. *1. Salk. 70, 71, 74.*

101. Arrest of judgment. *1. Salk. 77.*

102. Arrest de corps on Sunday. *1. Salk. 79.*

103. Kighly's case, Sid 338, denied to be law. *Ray. 162. 1. Salk. 91.*

104. Attachment. *id. 83.*

105. Attainder of felony. *1. Salk. 85.*

106. Attorney, client bound by the consent of his. *1. Salk. 89.*

107. Deputy, authority of a. *1. Salk. 95.*

108. Bail, on removal to superior court. *1. Salk. 98, 99, 100, 103, 104, 105.*

109. Trespass, *quare claus. fregil. 1. Salk. 107.*

110. Bankrupts, statutes of. *ib. 109.*

110 (*1*). Baron et feme, action against. *1. Salk. 115*, etc.

111. Bastard, *1. Salk. 123.*

112. Bill of exchange. *1. Salk. 125.*

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(1) Same number repeated twice in the manuscript.

113. Breach in covenants. *1. Ray. 621.*

114. Toleration act. *S. C. 1. Ray. 30.*

115. Condition, devise on. *1. Salk. 170.*

116. Conspiracy. *1. Salk. 172.*

117. Constable. *1. Salk. 175.*

118. Discontinue, leave to. *1. Salk. 178, 180, 181. 1. Ray. 1121.*

119. Counterbond or covenant. *1. Salk. 199.*

120. Officers, judicial, misdemeanors in. *1. Salk. 201.*

121. Jurisdictions, inferior. *1. Salk. 201.*

122. Costs. *1. Salk. 208.*

123. Possession of chattel sold. *1. Salk. 210. S. C. 1 R. 593, 1. Salk. 211.*

124. Default. *Salk. 216.*

125. Demurer in abatement. *1. Salk. 220.*

126. Deodands. *2. Cro. 483, ib. 220.*

127. Will, words in will expressing the intent. *1. Salk. 235, 236, 239, 234, 237,*

128. Will, construction of words in will. *1. Salk. 239.*

129. Will, intent by implication in will. *1. Salk. 236, 224, 226, 233, 225.*

130. Will, intent of the devisor in. *1. Salk. 227.*

131. Discent or purchase. *1. Salk. 242, 2. Ray. 829.*

132. Mortgage. *1. Salk. 245.*

133. Collaterals, definition of. *1. Salk. 38, 251.*

134. Dower. *1. Salk. 252.*

135. Ejectment. *1. Salk. 254.*

136. Error. *1. Salk. 262, 264, 266, 270.*

137. Escape from sheriff. *1. Salk. 271, 272.*

138. Money lent to an infant. *1. Salk. 279.*

139. Evidence in debt. *1. Salk. 278, 279.*

140. Evidence, depositions in perpetuam rei memoriam. *1. Salk. 280, 281, 287.*

141. Evidence, party interested cannot be. *1. Salk. 283, 286, 287.*

142. Evidence in money stolen. *1. Salk. 284.*

143. Promises, *id. 280.*

144. Exception, bill of. *1. Salk. 288.*

145. Executor. *1. Salk. 295. id. 311.*

146. Executor, plene administration pleaded by. *1. Salk. 296.*

147. Administrator dies before probat. *1. Salk. 304.*

148. Fieri facias. *1. Salk. 318, etc.*

149. Meaning, *juxta tenorem. 1. Salk. 324.*

150. Promise, *1. Salk. 325.*

151. Sheriff, fees of the. *id. 332.*

152. Murder, indictment for. *1. Salk. 334.*

153. Warrant, execution of a. *1. Salk. 348.*

154. Pedigree. *1. Salk. 355.*

155. Footway, repairing of. *1. Salk. 358.*

156. Cellar under privy of T. S. *1. Salk. 361.*

157. Damages, no, for matter insensible. *1. Salk. 364, id. 385.*

158. Imparle. *1. Salk. 367.*

159. Property, removable. *1. Salk. 368.*

160. Offenses, heinous. *1. Salk. 372.*

161. Forgery. *1. Salk. 375.*

162. Inquisition, coroner's. *1. Salk. 377.*

163. Indictment, causes for. *1. Salk. 382.*

164. Feme covert. *1. Salk. 387.*

165. Inn-Keepers. *1. Salk. 388.*

166. Deed, parties to a. *1. Salk. 389.*

167. Common, tenançy in. *1. Salk. 390.*

168. Partners. *1. Salk. 392.*

169. Evidence in debt. *1. Salk. 394.*

170. Judge, prerogatives of a. *1. Salk. 397.*

171. Judgment, confessed in terms. *1. Salk. 402.*

172. Jurisdiction of courts. *1. Salk. 404.*

173. Jury. *1. Salk. 405.*

174. Arrest by officer. *1. Salk. 408, 409.*

175. Law, English, in force in countries found by English subjects. *2. Salk. 411.*

176. Lease. *2. Salk. 413.*

177. Legacy, *2. Salk. 415.*

178. Libel, *2. Salk. 417.*

179. Limitations, statute of. *2. Salk. 420, 421, 422, 423.*

180. Possession, twenty year, *2. Salk. 421.*

181. Marriage per verba de presenti. *2. Salk. 437.*

182. Shipowners, responsibility of. *2. Salk. 442.*

183. Master, responsibility of. *2. Salk. 444.*

184. Merchant, definition. *2. Salk. 445.*

185. Trespass. *2. Salk. 455, 456.*

186. Nuisance, public. *2. Salk. 458, 459.*

187. Lights; stopping of. *2. Salk. 459, 460.*

188. Penalty, new. *2. Salk. 460.*

189. Bond. *2. Salk. 462.*

190. Deed, when necessary. *2. Salk. 467.*

191. Offices, sale of. *2. Salk. 468, and 466.*

192. Profert. *2. Salk. 497, 498.*

193. Return, false by a member of parliament. *2. Salk. 502.*

194. Contempt : to make the courts final and sole judges of them, is to make every man judge in his own cause. *2. Salk. 503.*

195. Writ of error, is writ of right. *id. ib.*

196. Law, new. *2. Salk. 504, id. 519.*

197. Bond, paiment to a. *2. Salk. 508.*

198. Innuendo. *2. Salk. 513.*

199. Demurrer. *2. Salk. 515, 518, 520.*

200. Pawn broker, refusing to redeliver goods pledged. *2. Salk. 522.*

201. Writs in the Register which no precedent warrants. *2. Salk. 638.*

202. Warren, definition of. *2. Salk. 556.*

203. Promise, interpretation of a. *2. Salk. 557, 558.*

204. King's printer, act printed by, evidence before jury. *2. Salk. 568.*

205. Act of the court. *2. Salk. 566.*

206. Limitation, words « upon condition » are a. *2. Salk. 570.*

207. Mandamus. *2. Salk. 272.*

208. Covenant not to sue, no release. *2. Salk. 573, 575.*

209. Rem[itt] er, contingent. *2. Salk, 576.*

210. Repleader. *2. Salk. 579.*

211. Bond, condition of a. *2. Salk. 585.*

212. Riot, definition of a. *2. Salk. 595.*

213. Contempt, definition of a. *2. Salk. 596.*

214. Money, when it can be brought into court. *2. Salk. 596.*

215. Scire facias, definition of a. *2. Salk. 598, 603.*

216. Penalty, to be recovered before justices of peace. *Salk. 606, 607.*

217. May equivalent to shall in a statute. *2. Salk. 609.*

218. Took v. Glascow, 1. Saunders 260, not law. *2. Salk. 619.*

219. Debt and assumpsit, difference between. *2. Salk. 622, 623.*

220. Interest. *2. Salk. 623.*

221. Sundays and holidays, to what extent juridical. *2. Salk. 624.*

222. Words, when overt acts of high treason. *2. Salk. 631, 633, 634.*

223. Trial, new. *2. Salk. 648, 646, 644, 653*, etc.

224. Jurisdiction, on issue depending on foreign laws. *2. Salk. 651.*

225. Piscaries, common. *2. Salk. 637.*

226. Trespass, « *contra pacem* ». *2. Salk. 636, 638, 639, 641, 637, 642.*

227. Trover. *2. Salk. 654, 655, 654.*

228. Tenor or sense. *2. Salk. 658, 660.*

229. Remittitur. *2. Salk. 658.*

230. Negro, status of a negro in England. *2. Salk. 666.*

231. The laws of England do not extend to Virginia, which being a conquered country, their law is what the king pleases. *Holt. Smith v. Brown and Cooper. 2 Salk. 666.*

232. Infant, bond of an, is void. *2. Salk. 427, 675.*

233. Tenure in tail. *2. Vent. 312.*

234. Misdemeanor of a clerk of peace. *2. Salk. 680.*

235. Wager of law, in debts. *2. Salk. 683.*

236. Horse, property of a. *2. Salk. 686.*

237. Witnesses, signatures of *2. Salk. 688.*

238. Witness, disability to be a. *2. Salk. 689, 690.*

239. Words, action for. *2. Salk. 696, 697... 692.*

240. Words, indictable. *2. Salk. 697.*

241. Law, Holt's case 2. *Jo.* 52. not law. *2. Salk. 699.*

242. Allegiance is the mutual bond between the king and his subjects, by which the subjects owe duty to the king, and the king protection to them. Treason is the breach of that duty of allegiance due to the king. If there is no allegiance, there can be no treason. Therefore an alien enemy cannot commit treason, but an alien friend abiding in the kingdom may, for he owes allegiance to the king. R. v. Tucker. *1.* Raym. *1.*

243. Orby v. Halls. 1. Ray. 3. doubted. *1. Ray. 20.*

243. *bis* Demurrer, general. *1. Salk. 296.*

244. Exeter college, administration of. *1. Ray. 5.*

245. King's bench, authority of. *1. Ray. 5.*

246. Error or audita querela. *1. Ray. 27, 1. Salk. 262.*

247. Debt on a deed. *1. Ray. 28, 1. Salk. 214.*

248. King, can compel a subject to serve in any function. *1. Ray. 32, 1. Salk. 168.*

249. Condition in a bond. *1. Ray. 39.*

250. Error, alledged in an order of justices. *1. Ray. 42.*

251. Verdicts, iniquitous. *1. Ray. 46.*

252. Error, writ of. *1. Ray. 47.*

253. Deceipt of the king. *1. Ray. 50* ; *2. Salk. 465.*

254. Estate, surrender of *1. Ray. 51* ; *2. Salk. 465.*

255. Lease for life. *1. Ray. 52* ; *2. Salk. 465.*

256. Garnishment. *1. Ray. 57.*

257. Carrier, case against a. *1. Ray. 58* ; *1. Salk. 10.*

258. Damages, part of the verdict. *1. Ray. 59* ; *1. Salk. 205.*

259. Promises, satisfaction of. *1. Ray. 60.*

260. Assault and battery. *1. Ray. 62.*

261. Wager in Deb. Ass. *1. Ray. 69.*

262. Justification by « taliter processum ». *1. Ray. 80.*

263. Oier, when grantable. *1. Ray. 83.*

264. Gaming act, English. *1. Ray. 87.*

265. General issue, when def. not obliged to plead the. *1. Ray. 88.*

266. Money given for ill use. *1. Ray. 85.*

267. Witness, son of a contingent legatee is no. *1. Ray. 91.*

268. Error, not on award of execution. *1. Ray. 98.*

269. *And*, meaning « *id est* ». *1. Ray. 480.*

270. Estate tail. *1. Ray. 101.*

271. Words, actionable. *1. Ray. 103.*

272. Breach of covenant. *1. Ray. 106.*

273. Animals : boar accustomed to bite. *1. Ray. 109.*

274. Bond. condition of a bond broken. *1. Ray 112.*

275. Award. *1. Ray. 112.*

276. Misnomer. *1. Ray. 117.*

277. *Quidam*, meaning of. *1. Ray. 119.*

278. Covenants, reciprocal. *1. Ray. 124.*

279. Abatement. *1. Ray. 101.*

280. Evidence. *1. Ray. 109.*

281. 2. Cro. 613. Swedling v. Piers. not law now. *1. Ray. 136.*

282. Gaol, county. *1. Ray. 136.*

283. Husband, when alien enemy. *1. Ray. 147.*

284. Elegance of Latin words in Law proceedings not considerable. *1. Ray. 148.*

285. Printed papers, sent to the jury. *1. Ray. 148.*

286. Penalty of a statute increased by act of Parliament. *1. Ray. 150.*

287. Manslaughter. *1. Ray. 138.*

288. Limitations, statute of, not evidence on non assumpt. *1. Ray. 153.*

289. Evidence, copy of. *1. Ray. 154.*

290. Render to prison . *Ray. 156.*

291. Maim, damages in. *1. Ray. 176.*

292. Note, when paiable. *1. Ray. 180.*

293. Timber, growing on land is mere chattel. *1. Ray. 182.*

294. Heir, devise to the next heir male. *1. Ray. 185.*

295. Devise for life and to male issue. *1. Ray. 203.*

296. *Usque ad*, meaning of. *1. Ray. 210.*

297. Possession. *1. Ray. 217, 218.*

298. Courts ecclesiastical, jurisdiction of. *1. Ray. 221.*

299. Agreement by feme covert. *1. Ray. 224.*

300. Servant buying for his master. *1. Ray. 224.*

301. Marshalsea, case of the. *1. Ray. 230.*

302. Battery, assault and imprisonment. *1. Ray. 231.*

303. Limitations, statute of, in debts. *1. Ray. 232.*

304. Trevillian v. Pine. *1. Salk. 107*, contrary to Harrison and Britton, *1. Ray. 233.*

305. Welsh words, used before English court. *1. Ray. 233.*

306. Part owners of a ship. *1. Ray. 235.*

307. Words, general, in a release. *1. Ray. 236*

308. Words, defamatory. *1. Ray. 236.*

309. Name, wrong name used. *1. Ray. 249.*

310. Perjury. *1. Ray. 256.*

311. Prædictus, meaning of. *1. Ray. 261, 466.*

312. Fire, negligently keeping a. *1. Ray. 264.*

313. Corporal punishment. *1. Ray. 267.*

314. Consignee, of a bill of lading. *1. Ray. 271.*

315. Fact, already confessed. *1. Ray. 263.*

316. Trespass and trespass on the case, different. *1. Ray. 272.*

317. Covenant, disjunctive. *1. Ray. 279.*

318. Date, computation of the d. of an act. *1. Ray. 480.*

319. Imparlande denial of. *1. Ray. 285.*

320. The necessity of trade has mollified the too rigorous rules of the old law in their discouragement of aliens. A Jew may sue at this day, whereas heretofore they could not, being looked on as enemies but now commerce has taught the world more humanity. The K. may proclaim war against one part of the subjects of a prince, and may except the other part. Wells v. Williams. *1. Ray. 282.*

321. Administrator, durante minor. *1. Ray. 283.*

322. Bankrupt. *1. Ray. 286.*

323. Husband and wife instrument between, no deed. *1. Ray. 289.*

324. Bastards. *1. Ray. 304.*

325. Executions for the king. *1. Ray. 305.*

326. Evidence, def's answer as. *1. Ray. 310.*

327. Covenant and warranty. *1. Ray. 322.*

328. Devises. *1. Ray. 325.*

329. Tenant for life. *1. Ray. 326.*

330. Yelverton *147*, is a hard case. *1. Ray. 334.*

331. Partnership. *1. Ray. 340.*

332. Error on principal judgment. *1. Ray. 342.*

333. Elegit and fieri facias. *1. Ray. 341.*

334. Bond taken by the sheriff. *1. Ray 353, 355.*

335. Demurrer. *1. Ray. 357.*

336. Linwood, by Holt half of what one finds in L. is not in the law of the land. *1. Ray. 363.*

337. Executor, qualifications of an. *1. Ray. 364.*

338. Covenant, limits of a. *1. Ray. 366.*

339. Money paid for good consideration, case for action. *1. Ray. 368.*

340. Action of debt and information. *1. Ray. 372.*

341. Action for false indictment. *1. Ray. 378.*

342. Bond, discharge of. *1. Ray. 408.*

343. Bail, common, for debt. *1 Ray. 383.*

344. Conclusion, special, by jury. *1. Ray. 385.*

345. Marriage, promise of. *1. Ray. 386.*

346. Goods, wrecked. *1. Ray. 388.*

347. Debt, acknowledgement of. *1. Ray. 389.*

348. Salvage. *1. Ray. 393.*

349. Plea, special. *1. Ray. 393.*

350. Bastard. *1. Ray. 395.*

351. Money, pl. bringing into court certain sum may proceed at his peril. *1. Ray. 398.*

352. Arrest by sheriff. *1. Ray. 411.*

353. Per quod, meaning of. *1. Ray. 408.*

354. Libel, copy of a. *1. Ray. 414.*

355. Defeasance. *1. Ray. 420.*

356. Justices, authority given to two. *1. Ray. 426.*

357. Journey's accounts. *1. Ray. 433.*

358. Pawn, not redeemable after pawner's death. *1. Ray. 433.*

359. Limitations, statute of. *1. Ray. 434.*

360. Debt. *1. Ray. 437.*

361. Avertment. *1. Ray. 438.*

362. Devise of lands. *1. Ray. 438.*

363. Querela audita. *1. Ray. 439.*

364. Restitution, grant of. *1. Ray. 440.*

365. Bill paiable to bearer. *1. Ray. 443.*

366. Bankrupt. *1. Ray. 443.*

367. Wife, debts contracted by. *1. Ray. 444.*

368. Words, actionable. *1. Ray. 446.*

369. Gaming, statute of. *1. Ray. 452.*

370. *1.* Ro. rep. 328, often overruled. *1. Ray. 453.*

371. Power to commit. *1. Ray. 454.*

372. Verdict, hard. *1. Ray. 469.*

373. Variance, in declaration of verdict. *1. Ray. 480.*

374. Consequences of unlawful act, responsibility in. *1. Ray. 480.*

375. Riot. *1. Ray. 484.*

376. Libel. *1. Ray. 486.*

377. Damages. *1. Ray. 489.*

378. Lease. *1.* Ray. *495.*

379. Writ. *1. Ray. 485.*

380. Will, witnesses in. *1. Ray. 507.*

381. Trial, new. *1. Ray. 514.*

382. 2 Bulstr. 186. disapproved. *1. Ray. 514.*

383. Bond, definition of a. *1. Ray. 519.*

384. In tail, lands devised. *1. Ray. 523.*

384. [*bis*] Books should not be cited at the bar but those licensed by judges. *1. Ray. 537.*

385. Bill of exchange is actual promise to pay. *1. Ray. 540.*

386. Limitations, statute of. *1. Ray. 553.*

387. Covenant lies against an administrator. *1. Ray. 553.*

388. Infants, law takes great care of. *1. Ray. 555.*

389. Bailee. *1. Ray. 558.*

390. Holt's ca. T. Jones 52. was never esteemed to be law. *1. Ray. 560.*

391. Names, a woman cannot have two Christian names. *1. Ray. 562.*

392. Alderman. *1. Ray. 563.*

393. Writ, when amendable. *1. Ray. 564.*

394. Plea. *1. Ray. 566.*

395. Lands devised to son and his heirs forever. *1. Ray. 568.*

396. *Adhunc et ibidem*, meaning of. *1. Ray. 576.*

397. Court, spiritual. *1. Ray. 585.*

398. Judgment by default. *1. Ray. 589.*

399. Executor, during minority. *1. Ray. 605.*

400. Animals, responsibility for keeping animals. *1. Ray. 606.*

401. Copyhold lands. *1. Ray. 622.*

402. Popham's reports, part not to be regarded. *1. Ray. 626.*

403. Ex concesso, taking matter. *1. Ray. 631.*

404. Bond conditioned to perform an award. *1. Ray. 634.*

405. Seamen, wages of. *1. Ray. 639.*

406. Damages. *2. Ray. 774*; *1. Ray. 643.*

407. Exchequer bills lost by postmaster. *1. Ray. 652.*

408. Deputy, misfeasance of a. *1. Ray. 655.*

409. Administration *durante minoritate* of administrator and executor. *1 Ray. 667.*

410. Daughter detained by father. *1. Ray. 673.*

411. Sunday, when to be reckoned. *1. Ray. 674.*

412. Common bail on two pleas. *1. Ray. 679.*

413. Corporation, powers of a. *1. Ray. 681.*

414. Custom house book as evidence. *1. Ray. 705.*

415. Sunday, declaration delivered on. *1. Ray. 705.*

416. Repleader, cannot be granted after issue joined, before verdict. *1. Ray. 707.*

417. Words, actionable. *1. Ray. 710.*

418. Felony, act made felony by act of parl. cannot be indicted as a trespass. *1. Ray. 711.*

419. Plea instead of a *Scire facias*. *1. Ray. 720.*

420. Sheriff, authority of a. *1. Ray. 718.*

421. Sheriff, may take a bail bond. *1. Ray. 722.*

422. Bankruptcy. *1. Ray. 724.*

423. Seisure of parts of the goods in a house by virtue of a *Fi. Fa. 1. Ray. 724.*

424. Servants, responsibility for acts of. *1. Ray. 725.*

425. Coparceners may join in ejectment. *1. Ray. 726.*

426. Mistake in devise. *1. Ray. 728.*

427. Jewel as heirloom. *1. Ray. 728.*

428. Lands chargeable with annuity, devised to heir. *1. Ray. 729.*

429. Estoppel, lease by. *1. Ray. 729.*

430. Constable, may execute warrant. *1. Ray. 736.*

431. Lease without deed. *1. Ray. 736.*

432. Tree, property of a. *1. Ray. 737.*

433. Gibbet, property of a. *1. Ray. 738.*

434. Bank bill. *1. Ray. 738.*

435. Trover. *1. Ray. 738.*

436. Responsibility for acts of servants. *1. Ray. 739.*

437. Term devised to executors in trust for paiment of debts. *1. Ray. 740.*

438. Limitations, statute of. *1. Ray. 741.*

439. Money, paid on void authority. *1. Ray. 742.*

440. Bills of exchange, foreign. *1, Ray. 743.*

441. Adultery, accusation of. *1. Ray. 727.*

442. Felony, evidence in. *1. Ray. 729, 730, 732, 734, 735, 745.*

443. Legatee, as a witness. *1. Ray. 744.*

444. Assurance. *2. Ray. 750.*

445. Bigamy. *2. Ray. 752.*

446. Carrier may retain goods for his hire. *2. Ray. 752.*

447. Note promissory and bill of exchange. *2. Ray. 757*

448. Promissory note. *2. Ray. 759.*

449. Judge, sitting on his own case. *2. Ray. 766.*

450. Summons, cause of action on. *2. Ray. 767.*

451. Default or confession in debt, judgments in. *2. Ray. 773.*

452. In tail, tenant. *2. Ray. 776.*

453. Litt. sect. *613* is said Hob. 339 not be law... *2. Ray. 781.*

454. Bond, when discharged. *2. Ray. 786.*

455. Bond, debt on a. *2. Ray. 787* ; *id. 803.*

456. Indebtedness for goods sold. *2. Ray. 787.*

457. Goods delivered to a carrier who does not deliver them. *2. Ray. 792.*

458. Error, brought the/year after judgment given. *2. Ray. 807.*

459. Ejectment. *2. Ray. 807, 808.*

460. Ejectment, judgment in. *2. Ray. 808.*

461. Rape. *2. Ray. 809.*

462. Debt on bond. *2. Ray. 814.*

463. Hob. 6. and Moor 708 not law. *2. Ray. 825.*

464. Words not actionable. *2. Ray. 831.*

465. Devise of « lands of inheritance » or of « the inheritance of his lands ». *2. Ray. 831.*

466. Wills, no regard to external accidents in exposition of. *2. Ray. 834.*

467. Cro. Jac. 404. has altered the law in 2. Leon, 59. 2. *Ray. 839.*

468. Indebtedness in foreign coins. *2. Ray. 841.*

469. «Therein» and « thereto », meaning of. *2. Ray. 842.*

472. Rights of creditors, in case of a man pardoned on condition he went beyond sea. *2. Ray. 848.*

471. Books of the E. India C° produced in evidence against themselves. *2. Ray. 851.*

473. Lease and release. *2. Ray. 854.*

473. Arbitrators. *2. Ray. 857.*

474. Keilw. 76 seemed to be denied. *2. Ray. 863.*

475. Carrier of stolen goods. *2. Ray. 867.*

476. Executors, *capias* against. *2. Ray. 878.*

477. Partners, joint. *2. Ray. 871.*

478. Bill of exchange. *2. Ray. 871.*

479. Trust and use. *2. Ray. 872.*

480. Words, scandalous, spoken of dead kings. *2. Ray. 872.*

481. Error both in fact and law. *2. Ray. 883.*

482. Action and indictment, difference between. *2. Ray. 886.*

483. 2 Ventr. 196 denied : *2. Ray. 899.*

484. « eodem » and « praedicto » difference between. *2. Ray. 888.*

485. Bond, validity of. *1. P. W. 44.* (1).

486. Verdict, special. *1. P. W. 48.*

487. Legacies, Darbison v. Beaumont. *1. P. W. 50.*

488. Robbery of the servant in presence of the master. *2. Ray. 904.*

489. Trespass, confession of. *2. Ray. 923.*

490. Wife, debts of the. *1. P. W. 57.*

491. Books of private nature, as evidence. *2. Ray. 927.*

492. Note as actual paiment. *2. Ray. 929.*

493. Ship ransomed by the master. *2. Ray. 931.*

494. Freeholder, right to vote. *2. Ray. 938.*

495. Actions for words. *2. Ray. 960.*

496. Thorpe v. Strickland. Yelv. 126 not law. *2. Ray. 984.*

497. Burchet, case of. *3. Inst. 140. 2. Ray. 978.*

498. Authorities mentioned in book can be cited, not book itself. *2. Ray. 932.*

499. Almanack part of common law. *2. Ray. 992.*

500. Horses lost by troopers. *2. Ray. 1007.*

501. Witness, man not compellable to swear against himself. *2. Ray. 1008.*

502. Statute, comprehended within the meaning of act precedent. *2. Ray. 1028.*

503. Breach of promise in non-performance of award. *2. Ray. 1039.*

504. « Issue », a word of limitation. *1. P. W. 108.*

505. The record Co. entr. ter. err. p. 9, 250. of Page's ca. does not warrant the rep. of it in 5 Co. rep. 45. b. Regina v. Tuchin. *2. Ray. 1.061.*

506. An error in Hodges v. Clare. 4. Mod. 14 being observed. Holt said « see the inconvenience of these scambling reports ; they will make us appear to posterity for a parcel of blockheads. » Slater v. May. *2. Ray. 1.071.*

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(1) Peere William's, *English Chancery Reports.*

507. Promise to pay made by executor. *2. Ray. 1.101.*

508. Commitment by the house of Commons *2 . Ray. 1105.*

509. Demurrer, to a plea in abatement. *2 Ray. 1022.*

510. Outlawry and trespass. *2 Ray. 1056.*

511. Apprentice, stealing from his master. *2. Ray. 1116.*

512. Condition, impossible, is void. *2. Ray. 1164.*

513. Witness, becomes blind. *2. Ray. 1166.*

514. Trust, breach of. *2. Ray. 1166.*

515. Powell : West's precedents is a pretty judicious book. Holt : there are many bad precedents in it. R. v. Best. *2. Ray. 1169.*

516. Misnomer, way of pleading. *2. Ray. 1178.*

516. [*bis*] Fullwood's ca. *1. Cro. 489.* wrong reported. R. v. Weston. *2. Ray. 1197.*

517. « and » for « or ». *2. Ray. 1201.*

518. Administration granted before will was found. *2. Ray. 1210.*

519. Mariner, wages of a. *2. Ray. 1211.*

520. Action brought by executor. *2. Ray. 1215.*

521. « a datu », meaning of. *2. Ray. 1242.*

522. « videlicet », its force. *2. Ray. 1272.*

523. Bastards. *2. Ray. 1273.*

524. Will. *2. Ray. 1282.*

525. Error, writ of, not abated by death of the def. *2. Ray. 1295.*

526, Plea non suited. *2. Ray. 1308.*

527. Hob. *202.* denied to be law. *1. Vent. 269.* see *1. P. W. pa. 692*, in margin.

528. Guardian of a child appointed by will. *2. Ray. 1334.*

529. Trial, new, *2. Ray. 1360.*

530. Bill of exchange. *2. Ray. 1361* it would be unnatural and uncomfortable, because destruction of liberty and independency ; so would be the enjoyment of the goods of fortune in common. Besides there subsists in man a remarkable propensity for appropriation, which makes us averse from a communion of goods. Property gives life to industry, and enables us to gratify the most dignified natural affections. In a communion of goods, what place would there be for generosity, benevolence, charity ? These noble principles, destitute of objects and exercise, would forever lie dormant. Hunting and fishing were originally the occupations of man, on which he chiefly depended for food ; the beast caught in a gin, or the fish with a hook, being the purchase of art and industry, were undoubtedly from the beginning, considered by all as belonging to the occupant, or as subjected to the occupant, or as subjected to his power. He might use them for sustenance, and towards that end defend the possession against every invader, but supposing the creature to have been lost, and without evidence to have come to the hands of another, I do not see that the original occupant would have had any claim, or that restitution would have been reckoned the duty of the possessor. Among savages, involved in objects of sense, and strangers to abstract speculation, property and the rights or moral powers arising from it, never are with accuracy distinguished from the natural powers which must be exerted on the subject to make it profitable to the possessor, for in the former case, right being attended with no visible effect, is a mental conception merely. So that in the original conception of property, possession was probably an essential circumstance. But tho' originally property was lost with the possession, it follows not that it was always acquired with the possession. That property cannot be acquired by theft or other immoral act, is a sentiment dictated by nature and therefore influences the grossest savages. Here is a clear foundation for obliging the not by statute, it was probably at first confined to writs of right; matters of less importance being left to purgation, but the new method of trial by jury, was so evidently preferable that it would soon become universal, and be extended to all cases civil and criminal. From this deduction it appears that a jury was originally a number of witnesses. Hence the process against them for perjury : were they considered as judges this would not be. Hence too the reason why the verdict of a jury is final, for single battle from the nature of the thing was so : the oath of purgation, in place of single battle, is so : and a verdict in place of purgation is so. It likewise explains how it happened to be necessary that the jury must be unanimous in their verdict ; because the compurgators must be so in their oath of purgation. In later times the nature and office of a jury is altered, thro' the difficulty of procuring twelve proper witnesses acquainted with the fact, twelve men of skill and integrity are chosen to judge of the evidence. If jurors, considered as witnesses, were uncertain about the facts, they would naturally demand extraneous evidence, of which it would belong to them to judge. Thus they act both as witnesses and as judges. And indeed they are principally considered as judges of the fact, and scarce at all as a body of witnesses. *L. Kai. H. Law. tract. 2.*

559. HISTORY OF PROPERTY. That peculiar relation between persons and things, signified by the term « property » is one of the great objects of law. Man, by his nature is fitted for society, and society by it's conveniences, is fitted for man. The perfection of human society, consists in that just degree of union among individuals, which to each reserves freedom and independency, as far as is consistent with peace and good order. The bonds of society may be too lax, but they may also be overstrained. A society where every man shall be bound to dedicate the whole of his industry to the common interest, would be of the strictest kind, but

531. Woman, secreting a. *2. Ray. 1368.*

532. Insulting a justice in the execution of his office. *2. Ray. 1369.*

533. Bond, length of time in paiment. *2. Ray. 1370.*

534. Action, personal, against several. *2. Ray. 1374.*

535. Trespass on the case, and vi et armis, distinction between. *2. Ray. 1399.*

536. Return, false, by sheriff. *2. Ray. 1411.*

537. « Heir », word of limitation, « issue » is not. *2. Ray. 1437.*

538. Elegit returned that the party has no land. *2. Ray. 1451.*

539. Bail, liable. *2. Ray. 1452.*

540. Father in law not obliged to maintain his daughter in law. *2. Ray. 1454.*

541. Murder of express malice. *2. Ray. 1485.*

542. Words, actionable. *2. Ray. 1480.*

543. Plea of nihil debet. *2. Ray. 1500.*

544. Contempt to the court. *2. Ray. 1528.*

545. Oyer. If de. prays « oyer » of a bond. *2. Ray. 1540.*

546. Estate for life. *2. Ray. 1561.*

547. Damages, occasione detentionis debiti. *2. Ray. 1570.*

548. Deputy, power of making a. *2. Ray. 1574.*

549. Words not actionable. *2. 1. Ray. 1588.*

550. The father devises his land to his son W. and the heirs of his body, and if his said son should die, without issue of his body, and the s̃d testator's wife should survive the s̃d son, then his wife to enjoy for life and after her death, the premisses to be enjoyed by his sister M. for her life, and after her decease, his son W. being dead without issue as afores'd, then he devised the premisses to J. S. and his assigns for ever. The wife dies, and then the son dies without issue. Qu. whether the contingency of the son's dying without issue in the life of the testator's wife was annexed to all the subsequent limñs, so as to prevent their taking effect on it's not happening ? Justice Reynolds, (to whom it was referred) had the devise been to the testator's son and the heirs of his body, and if he die without issue, and the wife survive him, then to her for life ; it might have been a vested and a common rem̃r to the wife : but as it would have been plainly contingent if the devise had been to her in tail or in fee, so it is the same thing here, because all the rem'r̃s are but as one estate arising on the same contingency and as from one root : wherefore the contingency never happening, the rem̃r depending thereon could never arise. Davis v. Norton. *2. P. W. 390.*

551. The ordinary may appoint an adm̃r pendente lite in the spiritual court touching the will of the decedent, who may maintain actions for debts due to him. So of an adm'r durante absentiâ of the next of kin beyond sea. Walker v. Wollaston. *2. P. W. 596.*

552. Benefit of clergy was a refuge provided by the common law in favor of a literate offender : it took it's original from the great regard shewn to the church ; and tho' at first only clerks in orders were allowed such privilege, yet it was afterwards, in favor of learning in general extended to all persons capable of taking orders. The method of trial was : the party was delivered to the ordinary for purgation : he was to make oath himself of his innocence : his compurgators were to swear that they believed him innocent : then the witnesses were to give their evidence : after which the jury was to bring in their verdict. If this was for the prisoner, the ordinary pronounced him innocent, the effect of which was that he was restored to his credit, his liberty, and capacity of purchasing : but it had no retrospect to restore him to anything he had forfeited. This purgation introducing variety of perjuries, the *18. El. c. 7.* enacted that after allowance of clergy, he should not be delivered to the ordinary, but after he had been allowed his « clergy, and been burnt in the hand, he should be forthwith enlarged and delivered out of prison, by the » same justices : proviso that the judge may if in discretion he think fit, continue the offender in prison a year ». By this stat. then two things were necessary to the prisoner's discharge from the felony, and to constitute the statute pardon, vid. allowance of clergy : and burning in the hand in all cases where by law burning in the hand ought actually to take place, (for clergymen, peers of the realm, and those who have the k's pardon are exempted from the actual cautery). After this comes the *4. Geo.* 1. *c. 11.* which enacts « that the court instead of ordering offenders to be burnt in the hand may order them to be transported to the colonies and plantations in America, for *7* years and transfer them to the transporter, and such service for *7* years shall have the effect of a pardon as to the crime for which they were transported and shall have so served. » The judgment of transportation then is in lieu of the judgm̃t for burning in the hand ; and actual transportation and service is in lieu of the actual burning Rex. v. Burridge. *3. P. W. 439.* [As an offender before *4. Geo. 1.* till actual burning in the hand remained a felon convict, so must the same offender now remain so till transportation, and the seven year service ended. Again, as a stranger by unlawfully receiving and comforting an offender who had escaped before actual burning became accessary to the felony after the fact : qu. whether a person receiving and comforting a transported convict, who has escaped from his master before the service expired, does not make an accessary to the felony after the fact? but the receipt to make him an accessary must be knowing him to be such.]

553. Wherever an act of parl. is introductory of a new law, words in the affirmative imply a negative said by counsel in Rex. v. Burridge. *3. P. W. 439.*

554. See strong objections against Biggins's ca. 5. Co. 50. drawn by counsel from different reports of the same case. Moore. 571. *Cro. El. 632, 682.* by the counsel in Rex v. Burridge. *3. P. W. 439.*

555. (*Left blank by Jefferson*).

556. The doctrine of Conditions in Feoffments and Bonds as treated in *Co. Lit. fo. 206.* may thus be stated:

Conditions	Bonds	Possible...	lawful			Necessary Performance
			unlawful			Unnocessary
		Impossible.	at the time of making			Necessary
			become so after making	By act of god, law, or conditionee..		Unnecessary
				By any other act		Necessary
	Feoffments	Possible...	lawful			Necessary
			unlawful		Precedent...	Necessary
					Subsequent..	Unnecessary
		Impossible.	at the time of making		Precedent...	Necessary
					Subsequent..	Unnecessary
			become so after making	By act of god, law, or conditionee..	Precedent...	Necessary
					Subsequent..	Unnecessary
				By any other aot		Necessary

From whence the Theorems may be drawn. I. « in Bonds, whenever the condition becomes impossible after the making by the act of god, of the law, or of him in whose favor it was to be performed, or whenever it is to perform an unlawful act, Nonperformance shall not forfeit the Bond: in all other cases it shall. »

II. « In feoffements, whenever a condition *subsequent is impossible at the time of making it,* » or becomes so after by the act of god, of the law, or of him in whose favor it was to be performed, or whenever it is to perform an unlawful act, nonperformance does not forfeit the estate; in all other cases it shall. » It must be observed that the cases put by Coke of cond'ns contrary to law and not mala in se are « that the feofee shall not alien »; « shall not infeoff his wife»; « shall not take the profits ». etc. These are only repugnant to law, and are therefore included above among impossible conditions, because the law has rendered them so; but there are other acts not mala in se contrary to law, which are termed *mala prohibita*: for instance the killing deer at a particular season, these Coke seems not to have had in view. Condñs to perform acts of this kind should be ranked with those to perform mala in se.

557. HISTORY OF THE CRIMINAL LAW (1). On certain actions hurtful to others the stamp of wrong is impressed in characters legible even to the delinquent himself. Passing from the action to it's author, we feel that he is guilty; and we also feel that he ought to be punished for his guilt. Himself is filled with remorse and an anxious dread that the punishment will be inflicted, unless prevented by reparation. The wisdom of this contrivance is conspicuous. A sense of wrong is of itself not sufficient to restrain the excesses of passion;

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(1) Lord D. KAMES : *Historical Law Tracts*, published for the first time in 1758.

but the dread of punishment, which is felt even where there is no visible hand to punish is a natural restraint so efficacious that none more perfect can be imagined. This dread, when the result of atrocious crimes, is itself a tremendous punishment, far exceeding all that have been invented by man. On every wrong, reason and experience make us apprehend the resentment of the person injured. From a consciousness that punishment may be justly inflicted by the person injured, by the magistrate, or by anyone, proceeds the efficacy of punishment. Abstracting from this consciousness, chastisement would be misapprehended for malice or oppression. Corresponding to the dread of punishment is the indignation every one has at gross crimes, and the resentment of the person injured even for the slightest crime ; by which sufficient provision is made for inflicting the punishment dreaded. Resentment, when confined within due bounds, is authorized by conscience. The delinquent is sensible he may be justly punished ; and if anyp erson, preferably to others, be entitled to inflict the punishment, it must be the person enjured. Revenge, therefore, is a privilege that belongs to every person by the law of nature. Resentment is raised in different degrees according to the sense one hath of the injury. By a principle inherent in all sensible beings, every one has the strongest sense of what touches itself. Thus a man has a more lively sense of a benefit or injury done himself, than to his friend. Every heinous transgression of the law of nature, raiseth indignation in (*1*) all, and a keen desire to have the criminal brought to condign punishment. Slighter delinquencies are less regarded, but resentment for an injury done one's self is gratified only by punishing the delinquent. He must himself inflict it, and the

(1) 'Εσθλου· γαρ ανδρος τῃ δικῃ θ'υπηρετειν
Και τους κακους δρᾶν πανταχου κακως αει

Eurip., *Hecuba*, 844. Jefferson's note.

criminal must be made sensible it proceeds from him, in order to gratify his resentment. Tho' voluntary wrong is generally the cause of resentment, sudden pain sometimes raises this passion, tho' no injury was intended. Treading or a gouty toe, or breaking a favorite vase, or a warm temper, produces this effect. the mind engrossed by bodily pain, or any pain which raises bad humor, demands an object for it's resentment, and what object is so ready as the person who occasioned it, tho' without design. Thus a stock, a stone, cards, dice, become the objects of resentment, but these fits of passion are but momentary, and vanish on reflection ; whereas resentment raised by a voluntary wrong, being a useful passion, is made to subsist, till the sense of injury be done away by punishment, atonement, or time. This passion is still more savage and irrational, when without distinguishing the innocent from the guilty. it is exerted against the relations and possessions of the criminal. In the laws of the Bavarians the use of women was forbid to clergymen. «*Lest the people be destroyed for the crime of their pastor*,» a very gross notion of divine punishment (*1*). Yet the Grecians entertained the same notion : « *Latona's son a dire contagion spread, And heap'd the camp with mountains of the dead, The king of men his reverend priest defy'd, And for the king's offence the people dy'd.* » So late as the days of king Edmond a law was made in England forbidding deadly feud except between the relations of the deceas'd and the murderer himself. We have observed above that revenge is a natural privilege ; that the criminal has a sense of merited punishment, and therefore submits to it. From this right of punishing, and duty of submission punishment has erroneously been considered as a debt,

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(1) I am a jealous god, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me. *Exod.* 20. 5. 2. *Sam. c.* 12. *v.* 14. 15. 18. Note of Jefferson.

wich the criminal is bound to pay, and from this resemblance a notion prevailed in the darker ages of the world, of a (*1*) substitute in punishment, who undertakes the debt, and suffers the punishment that another merits. When a Roman army was in hazard of a defeat, it was not uncommon for the general to devote himself to death, to obtain the victory.

So in Lucan... « *cunctis ego pervius hastis Excipiam medius totius vulnera belli. Hic redimat sanguis populos : hac caede luatur Quicquid Romani meruerunt pendere mores.* » No maxim has a more solid foundation than that punishment cannot be transferred from the guilty to the innocent. Punishment considered as a gratification is purely personal. Resentment cannot be gratified but by retaliating on that very person who did the injury. Yet from the foregoing notion so obviously erroneous proceeded the barbarous practice of human sacrifices : the vitious being ever solicitious to transfer

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(1)......man disobeying
Disloyal breaks his fealty, and sins
Against the high supremacy of heav'n,
Affecting godhead, and so losing all,
To expiate his treason, hath naught left ;
But to destruction sacred and devote,
He, with his whole posterity, must die ;
Die he or justice must, unless for him
Some other able, and as willing, pay
The rigid satisfaction, death for death.
Say, heavenly powers, where shall we find such love ?
Which of ye will be mortal to redeem
Man's mortal crime, and just th'unjust to save ?
Dwells in all heav'n a charity so dear ?
........the son of god
His dearest mediation thus renew'd.
Father, thy word is pass'd, ...
Behold me then ; me for him, life for life
I offer ; on me let thine anger fall ;
Account me man ....

Milton, *Par. Lost. B.* 3. *v.* 203. ***Note of Jefferson.***

on others the punishment they themselves deserve; for nothing is so dear to a man as himself. Thus men have been misled to flatter themselves that without repentance or reformation of manners, they could atone for their sins; and by this pernicious notion have been encouraged to indulge in them without end. Many give punctual attendance at publick worship to compound for hidden vices. Many are openly charitable to compound for hidden oppression. Having discoursed of the nature of punishment I shall now attend it's progress thro' the different stages of the social life. Mutual defence against a more powerful neighbor being in early times the chief, or sole motive for joining in society, individuals never thought of surrendering any of their natural rights which could be retained consistently with their great aim of mutual defence. The privilege of maintaining their own property and avenging their own wrongs, particularly, were reserved to individuals full and entire. In the dawn of society we find no traces of a judge. Disputes were left to arbiters. This method was found to be imperfect, for suppose the parties could not agree in the choice of an arbiter? A judge was therefore established who could not be declined, but he having no power of compelling appearance, the complainer was allowed to drag his party before the judge, *obtorto collo*. The last additions of power of calling a party into court, and of making a sentence effectual, completed civil jurisdiction. Criminal jurisdiction in all countries is of a much later date. The darling privilege of resenting injuries was latest wrested from individuals in society. This revolution must have been gradual; as the difficulty of wresting this privilege may be known from the practice of duelling which is not yet quite repressed. A partiality rooted in the nature of man makes private revenge the most dangerous privilege that ever was left with individuals. The man who is injured, having a strong sense of the wrong that is done him, never dreams that his resentment can be pushed too far. The offender, under-rating the injury, judges a slight atonement to be sufficient. Further, the man who suffers it is apt rashly to fix the blame on persons, where it doth not clearly appear who is the criminal. To prevent this last mischief, it was a law among the Athenians, and also among the barbarous nations who dismembered the Roman empire that if a crime was manifest, the party injured might avenge himself without ceremony. Thus he might slay his wife and the adulterer found together, but, if the fact was not manifest, a previous trial was necessary. If found guilty they were delivered to the person injured to be punished at his will. The necessity of applying to a judge where any doubt arose about the author of the crime, was probably the first instance of the legislature's interposing in matters of punishment. Tho' a novelty it alarmed no one, as it tended not to restrain the privilege of revenge, but only to direct it on it's proper object ; next, to prevent the evil of putting the offender under the power of the party injured, there was a regulation in Abyssinia, that the governor of the province should appoint a judge to fix on a proper punishment, which was to be inflicted by the accuser. But a great latitude remaining in the manner of executing it, it was unlawful among the Athenians to put the criminal to torture. It is natural to offer satisfaction to the party injured. Avarice, tho' not so fierce, is more stable than resentment, and the notion that punishment was a debt facilitated the introduction of pecuniary composition. This custom prevailed among the antient Greeks. Hom. *Il.* K. 9. l. 743.,,, « if *a brother bleed, On just atonement, we remit the deed. A sire the slaughter of his son forgives. The price of blood discharged, the murd'rer lives.* » This practice at first rested altogether on private consent. It was countenanced among all nations, as likely to restrain the impetuosity of revenge, till becoming customary, it was established into a law, but this change was slow. The first step probably was to interpose in behalf of the delinquent when a reasonable composition offered by him, was refused by the person injured. Thus others, being held to be under the immediate protection of the deity, won places of sanctuary, among most nations. Hom. *Od.* 22. l. 370. «*Beside the gate the rev'rend minstrel stands ;... Dubious to supplicate the chief, or, fly To Jove's inviolable altar nigh,* » and Virg. *Aen.* 2. l. 524. «*Huc tandem concede haec ara tuebitur omnes.*» It was enacted in England, by a law of king Ina, that if any guilty of a capital crime fly to the church, his life shall be safe, but he must pay a composition. Thus tho' the privilege of sanctuary was useful while punishment was in private hands, it ought not to be tolerated now when there is no hazard of excess in punishment, and it would only serve to restrain the free course of the criminal law. The second step towards establishing pecuniary composition was to make it unlawful to prosecute resentment without first demanding satisfaction. The last step, which compleated it, was to compel the delinquent to pay and the person injured to accept a proper compensation. As punishment was looked on as a debt, compositions were considered as reparation to the party injured for his loss. Hence no distinction was made between voluntary and involuntary wrong, but aggravating circumstances were laid hold of to inflame the composition : as the quality of the person killed, the stealing goods in a fire. In the infancy of society the idea of a publick is so faint and obscure, that public crimes, where no individual is hurt, pass unregarded, but when government arrives to some degree of maturity, the nature of a crime against the publick is understood, it comes to be considered, that by all atrocious crimes the peace of the society is broke. Hence a fine was imposed over and above what the person injured was entitled to recieve. But the practice of converting punishment into money, tho' it prevented a greater evil, was too absurd to be supported against enlightened reason. Certain crimes came to be reckoned too atrocious to admit of a pecuniary conversion. Here then the magistrate having once interposed in punishment, had a fair opportunity, of farther interposition to decree an adequate punishment. The first instances of this kind had probably the consent of the person injured ; and it was not difficult to persuade a man of spirit that it is more for his honour to see his enemy condignly punished, than to put up with a trifling compensation in money. The new method of punishing atrocious crimes gained credit, became customary, and past into a law. To preserve a strict proportion between a crime and it's punishment, is not the chief view of a wise legislature. The purposes of human punishment are to add weight to those which nature has provided, and to enforce municipal regulations intended for the good of society. On the other hand, a crime however slight, ought to be severely punished, if it tend greatly to disturb the peace of society. Capital punishments should be avoided as much as possible, and punishments chosen, which, equally with death, restrain the delinquent from committing the like crime a second time. The antient Egyptian punishments have this peculiar character, that they effectually answer their end, with less harshness and severity than is found in the laws of any other nation, antient or modern. Those who revealed the secrets of the army had their tongues cut out. Those who coined false money had their hands cut off. He who committed rape was castrated. A woman committing adultery, lost her nose, that she might not again allure men to wantonness. Different countries have appointed different persons to prosecute public offenders. In Rome every individual might do it. In England an attorney for the crown is appointed. There too, personal liberty being sacred, to prevent the oppression of criminal prosecutions, no trial for a capital crime can proceed in the name of the crown, till a grand jury of the county examine it. The interposition of the sovereign authority to punish crimes more severely than by a composition, was at first, we may suppose, not very common, but as in all other cases, the novelty wore off by reiteration of acts, and what was at first an extraordinary remedy, by common practice was reckoned a branch of the common law. During the infancy of this practice it was a branch of the king's prerogative to interpose or not : to direct an extraordinary punishment, or to leave it to the common law. This was misapprehended for a privilege of pardoning even after sentence, a prerogative asserted by all lawyers, but seems to have no other foundation. Were it limited in criminal as in civil cases, not to give relief but where strict law is overbalanced by equity, the prerogative would be more rational, but the foundation of the prerogative was not forgot, for by a law of Edward the Confessor it was declared that tho' the king pardon a capital crime by his prerogative, the criminal shall pay a composition to the party. The *vergelt* then, or composition for crimes is still in force where the criminal obtains a pardon. The practice may be discovered too in civil actions, in which a sum is given as damages, tho' the pursuer cannot specify any real damages. This is given in solatium to gratify his resentment. Such are damages given in solatium to gratify his resentment. Such are damages awarded to a husband against a man who corrupts his wife. *L. Ka. Hist. law tracts. 1.*

558. HISTORY OF PROMISES AND COVENANTS. Moral duties, originally weak and feeble, acquire great strength by refinement of manners. Promises and covenants particularly, have seldom among barbarians weight sufficient to counterbalance appetite or passion. In the progress of social life the use of a covenant becomes visible. Courts were instituted to compel duty. This invention was confined originally within narrow bounds. To take under the protection of a court natural obligations of every sort, would, in a new experiment, have been reckoned too bold. It was deemed sufficient to enforce such duties as contribute most to the well being of society. A regulation so important gave full satisfaction, and while recent left no thought of further improvement, but this distinction between the more, and the less, useful contracts, is not made where the effect of an agreement is not to create, but to dissolve an obligation, *pacla liberaloria* have in all ages been enforced by law. The reason commonly assigned « that liberty is more favorable than obligation » is not satisfactory. This seems more solid : there is a wide difference between refusing action on a just claim, and sustaining action on a claim that is unjust. In the former case, the court is only less useful than it might be ; in the latter, it enforces iniquity. It is not surprising to find courts confined originally within bounds too narrow in point of utility : but it would be strange indeed if it were made their duty to enforce wrong of any sort. For instance, in refusing to make effectual a gratuitous promise, no harm is done : matters are but where they were before the institution of courts. But a demand of a debt after it is discharged, tho' by a gratuitous promise is certainly unjust : to support this demand would be a positive act of injustice in a court : to avoid which the gratuitous promise must be allowed as a good defence. No naked promise was by our forefathers countenanced with an action : not even a contract of buying and selling. The case must be excepted of an agreement acknowledged in court and recorded. The solemnity of making it, and the certainty of the evidence, left not that locus penitentiae which was allowed in other cases. Having considered how far naked promises were effectual by our old law, I proceed to enquire what proof of a contract was necessary. Evidence may be distinguished into natural and artificial. To the former belong proof by witnesses, by confession of the party, and by writing. To the latter belong the extraordinary trials by fire, water, and battle. Witnesses were admitted, before writing was invented or became common, to prove the existence of a debt, as well as paiment of it. But experience discovered the danger and uncertainty of such evidence, which therefore, as writing became common, was confined within narrow bounds. It was established that two witnesses should not prove the existence of a debt of more than 40 sh., and that the number of witnesses should be in proportion to the debt. But paiment being a more favorable plea may be still proved in England by parol evidence. The second species of natural evidence is confession of the party ; which in the strictest sense must be a confession ; that is, it must be voluntary, for by the original law of this island no man is bound to bear testimony against himself. Courts of equity, instead, take greater liberty. The third species is writing ; which is of two kinds ; record of court, or writing executed privately between the parties. The first is called recognisance, and as a matter of record is so compleat evidence of itself as to admit of no contrary averment. From this recognisance sprung what is called in England a bond in judgment. This agreement is taken in writing, and at the same time a mandate granted to a procurator to enter it on record and confess judgment. If any subsequent dispute happen, he does this, and faith is given to it by the court as if recorded at first ; it's authority being joined with the averment of the procurator. And from the nature of the thing, the mind must rest on some fact without witnesses. A bond, for example, is vouched by the subscription of the granter, his subscription by that of the witnesses. This last must be held true if faith be at all given to writing, or else there must be a chain of evidence without end. As to private writing used as evidence, a party may deny it's truth, and plead non est factum; but this like all other exceptions must be verified by proof, for a bond signed, sealed, and delivered is an effectual obligation, and therefore a good foundation for an action, or in other words, it is probative, needs not extraneous evidence, and therefore cannot be defeated without contrary evidence. The witnesses even if dead prove the bond. This is no more than presuming the bond true till the contrary is proved. Witnesses are not essential by the law of England : it is sufficient to specify in the declaration that the bond was signed, sealed, and delivered. Of the signing and sealing the bond itself is evidence ; and it is legal evidence of the delivery that the bond is produced by the obligee. Of the artificial evidence, that by fire and water were soon discharged ; trial by single battle, introduced by Dagobert king of Burgundy, being more agreeable to the genius of a warlike people, was longer retained. Nor was it at last directly abolished. All that could be done was to sap it's foundations, by substituting gradually another method of trial. This was the oath of purgation, or wager of law, instead of wager of battle. In this the def: brings with him his compurgators who are to swear that his oath is true. Considering this form in itself, and that it was admitted where the pl's proof was defective, it is most repugnant to justice, for why thus burden a def., when there is no proof against him ? but considering it as substituted in place of the wager of battle, it was an improvement, as it gave the def. his choice to enter the lists in a warlike manner, or to take the oath of purgation. But it was found insufficient to check the barbarious custom of duels ; duels were therefore limited in Scotland to capital crimes where there are probable suspicions without direct evidence. It is probable as single battle gave way to the oath of purgation, this oath gave place to juries. The transition was easy, and it appears from Glanvill that about that time a privilege was bestowed on the def., in disputes concerning the property of land founded on a brieve of right, to have the cause tried by a jury instead of battle. As this innovation was only authorized by reason theif to restore. He has no title to retain what is not his property, and he is bound in conscience to repair the damage by restoring the possession, and consequently the property. But this claim of restitution reached not a *bonâ fide* purchaser, who having done no wrong was not liable to make reparation. Among the antient Romans a *condictio furtiva* against the thief was afforded to the man who lost his goods by theft. This action founded on the delinquency of the def. takes it for granted that the pursuer had by theft lost his property, and restores it to him by compelling the def. to yield the possession. Afterwards when property was distinguished from possession, and theft was held not sufficient to deprive a man of his property a *rei vindicatio* was given, which takes it for granted that the property remains with the pursuer, and restores him to the possession.We find traces of the same way of thinking in other matters. A man who by force or fear was compelled to sell his subject at an undervalue had no redress by the common law of the Romans. The praetor first took upon him to restore him *in integrum* : but only against the wrongdoer. But after the doctrine prevailed that property can subsist independent of possession, it was questioned whether a *rei vindicatio* would not lie against a *bonâ fide* purchaser : for delivery, it was observed, could not transfer property without consent, and a contract is no evidence of consent where force is interposed. Accordingly an *actio metus* was allowed which in effect was the same with a *rei vindicatio.* We know that formerly in Scotland, when a thief was condemned, even his stolen goods were confiscated, and in England buying and selling was by a law prohibited except in open market, to prevent the transference of property to an honest purchaser of stolen goods. How then has property acquired such strength now as to exclude even an honest purchaser from one whose title was lame ? An answer to this must be drawn partly from natural, partly from political principles. Man, by the frame of his body, is unqualified to be an animal of prey. His stomach requires more regular supplies of food than can be obtained in a state where nourishment is precarious. His necessities taught him to tame such wild creatures as are docile, herds of cattle, sheep, and goats were propagated to be ready at hand for daily food. In this state, which makes the second of the social life, the relation of property, tho' not entirely disjoined from possession, was considerably enlivened.

The care and attention bestowed on a domestic animal from it's birth, form in the mind a strong connection betwixt the man and his beast, which, in any casual interruption of possession, does not so readily vanish, as in the case of a wild beast seised by a hunter. The relation of property being thus in some measure fortified a political principal rendered it still more intimate. Experience shewed that theft and robbery could not be repressed, if purchasers were secured on pretext of bona fides; and it became a law that no man could be deprived of his property without his own consent, except singly in the case of a purchase *bona fide* in open market. Having advanced so far in the history of moveable property, it is full time to turn our view to the property of land. In the two first stages of social life, while men were hunters or shepherds, there could be little notion of land property. Men wandring about (*sic*) for pasture had scarce any connection with land more than with air or water. A field of grass might be considered as belonging to a herd or clan while they were in possession, and so might the air in which they breathed, and the water of which they drank, but the moment they removed to another quarter the connection was lost. Agriculture, which makes the third stage of the social life, produced the relation of land-property. A man who has bestowed labor in preparing and improving a field, contracts an affection for a spot, which in a manner is the workmanship of his own hands. After a summer expedition, or years of a foreign war, he returns with avidity to his own house, and his own field, there to pass his time in ease and plenty. By such trials the relation of property being gradually evolved is disjoined from possession. If a proprietor happens to be dispossessed in his absence, the injustice is percieved by everyone, he will still continue proprietor in the eyes of mankind, and a *rei vindicatio* will be sustained to him, against the possessor, who cannot acquire the property by an immoral act. But if it had come to a *bonâ fide* purchaser, it was irrecoverable equally with moveables in the same case. But land being an object of strong affection would soon acquire stability of property. In no civilized country, for many centuries past, has *bona fides* alone been held to secure the purchaser of land. It is probable that the strong nexus of land property, which cannot be loosed but by consent, contributed to make moveable property stable : but it is also probable that moveable property led the way to a power of alienation. A moveable may be locked up in a repository. Cattle may be killed for the sustenance of the proprietor, and what doubt can there be of my power to alien what I can destroy ? Land admits not like moveables a ready delivery from hand to hand ; and was not probably so soon alienable as moveables : but being a desirable object, it would soon be made alienable, after the way was once shewn by moveables. Words merely make no great impression on the rude and illiterate ; such is our attachment to sensible objects, that it would have appeared like magic or the tricks of a juggler, to make the property of land jump from one person to another merely on pronouncing certain words expressing will or consent. Some external solemnity therefore, as a symbol of delivery, was necessary to compleat the transference of land-property. Occupation is still necessary to acquire property in unoccupied land. It was formerly necessary to transfer land, for property being supposed not to exist without possession, the latter was necessary to convey the former. As soon as property became independent of possession it was natural to relax the ceremonies of transference. It being troublesome to introduce a purchaser with his family into the natural possession, some overt act was substituted, as representing possession. An act was chosen at first as distinctly representing possession as possible. Thus a grant of land to the church was perfected by laying a turf of the land on the altar. (so in *Herod. 1.4.* Darius demands of the Scythians to bring him a turf and water as symbols of the delivery of their country to him, and when they send him a bird, a mouse, a frog, and a bunch of arrows, he thus construes the gifts ; a mouse as living in the ground was the symbol of that, a frog of the water in which he resided ; a bird, sais he, is like a horse ; and the arrows represent their power or military force which is thus delivered up) after symbolical delivery became customary there was less nicety in the choice. Any symbol was taken however little connected with the land. Ulphus king of Deira delivered a horn to the monastery of York as a symbol to compleat a grant of land in their favor. Writing at present being common and the meaning of words ascertained, it is probable that when our notions become more refined, and substance to be regarded more than form, external symbols, which have long been laid aside in personal rights, will also be laid aside in rights affecting land. We return to our history. Property as originally limited, bestowing no power of alienation, carries the mind naturally to the children of the possessor, who continue the possession, and must succeed if he cannot alien. Their right being independent of his will was conceived a sort of property. They make part of his family, live on the land, and in common with their parents, enjoy the product of the land. When the father dies, they continue in possession without any alteration, but that the family is less by one than it was formerly. This right was not readily to be distinguished from property, and was in effect the same as the strictest entail that could be contrived. That this was the notion of the ancients, appears from a learned Roman lawyer Paulus : « *in suis heredibus evidentius apparet, continuationem dominii eo rem perducere ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodam modo domini existimantur.* » Yet this author was far removed from the infancy of the law. While property subsisted without power of aliening, no deed done by the father, whether civil or criminal, could affect the children. It was a law of Edward the Confessor, that children born or begot before commission of a crime shall not lose their inheritance. After alienation was introduced, we know that it was confined to a part only of the land. This was the law among the Jews, the Scots, and other European nations. But this gave place to commerce, and bargains about land are now as free as those about moveables, donations were of slower growth. They were at first small and on plausible pretexts. They gained ground and are now unlimited. Donations *inter vivos* paved the way to donations *mortis causa*. But this was a wide step and required the authority of a law, for it was hard to concieve that the will of any man should after his death and after his own right was at an end, have so strong an effect as to prefer any person to the lawful heir. The power of testing was introduced among the Athenians by Solon, and from them transferred by the Romans into their twelve tables, but they were not allowed to exheredate their own issue without a cause. It may appear singular that while children were thus gradually losing ground, collateral heirs, who originally had no privilege, were in many countries gaining ground. Children came originally in place of their parents, and not as successors, it was a continuation of the possession, founded on their own title of property. It was originally perhaps thought sufficient that children *in familiâ* only should enjoy this privilege. Afterwards the right of inheriting the family estate was probably communicated to children *foris familiate* especially if all the children were in that situation : next, failing children, to brothers, and so gradually to more distant relations. But there is a solid difference between the succession of collaterals, who never having had any pretext of right came in on the presumed will of the deceased, and of descendants, which originally did not depend on his will. But descendants and collaterals, being at length considered equally as representatives were blended in one class, and the privileges of the former were communicated to the latter. In England the powers of a proprietor are so far extended that he may disinherit both of these without cause, and even by a disposition to take place after his death. By the old law a donation had no effect without delivery : and a testament is considered as an incompleat donation of old, the dispositions in which the heir is not bound to make good by warranty. The powers of a proprietor were extended one should think, their utmost length. Every man had the full enjoiment of his own subject while it remained with him. He might dispose of it for a valuable consideration, or without one, and his power even reached so far, as to direct what person should enjoy it after his death, yet the thirst after power was never to be quenched. Men wished to combine their name, family and estate in the strictest union, and leaving nothing to the disposal of providence, they wished to prolong the union if possible to the end of time. These ambitious views produced entails. Before we enter on these a preliminary question must be discussed : whether and how far entails are consistent with the nature of property ? With respect to every subject capable of property, the whole powers of property, whether united in one person or distributed among a plurality, must subsist entire somewhere : and none of them can be sunk or annihilated so as to be beneficial to no person. The reason is obvious : the goods of fortune are intended for the use of man ; and it is contrary to their nature to be withdrawn from use in whole or in part. A man if he pleases may abandon his subject, but then no will or purpose of his can bar others. No law natural or municipal gives such effect to the will of any man. 2. Tho' none of his powers of property can be annihilated, yet a proprietor may by a civil obligation bind himself in the exercise of his property for the benefit of others. 3. It was a practice in Greece and Rome to adopt a son when a man had no issue. This was done in a solemn manner before the Calata Comitia, who in Rome poss'd the legislative authority. The adopted son had all the privileges of one born in wedlock : he had the same interest in the family estate, and continued the father's possession. When a testament was introduced by the laws of the twelve tables, it was understood to be only a different form of adopting a son. Consequently the testamentary adoption bestowed the same privilege of succeeding to the family estate. A testament with them then was not a conveiance of goods to another ; it was only a nomination of an heir, who took as such, and not as a purchaser. Hence the maxim in the Roman law, that « no man can die pro parte testatus, et pro parte intestatus,» and that if in a testament one be named heir, and limited to a particular subject, he shall yet of necessity take the whole. The privilege of adoption was never known in Britain. A testament here is a donation *causa mortis* ; and the disponee takes, not as heir, but as a purchaser. This explains the maxim that « God only can make an heir, not man.» The Romans distinguished between *haeredes nati*, or *haeredes facti* ; the latter we do not acknowledge at all. We shall now proceed to the subject of entails. We will first examine the power of substituting a series of heirs to each other ; and then proceed to the limitations imposed on heirs to prevent alienation. In England, the maxim that « God only can make an heir » is not so strictly taken as to exclude every person from the character of an heir, save the heir at law only. From the beginning nothing was more common in feudal grants, than to chuse a certain species of heirs, such as the male descendants of the vassal, or the heirs of a marriage. These are heirs in the sense of the English law, tho they may happen not to be the heirs who would succeed by law.

Hence every person who is called to the succession under a general description such as heirs of the body, etc, is considered as an heir, in opposition to a stranger. The true sense of the maxim then appears to be that no person can have the character of an heir who is not of the blood ; and also unless he be called under some general description. Therefore when a gift is made to Sempronius and the heirs of his body, and failing these, to Titius and the heirs of his body ; Titius comes in not as an heir to Sempronius, but as an immediate donnee, or purchaser, as Sempronius was, and claiming under the original grant. Consequently he is not liable to fulfil the debts or deeds of Sempronius. 2. the limitations on heirs to prevent alienation. The vassal's right being originally a liferent or usufruct only, he had no power to alien the property which remained with the superior. After a regular government was introduced in Britain, and the arts of peace began to prevail, the vassal was willing to purchase independence with his money, and the superior who had no longer occasion for military tenants, disposed of his land to better advantage. Land being thus got into the hands of purchasers who had paid a valuable consideration for it, instead of being beneficiary as formerly, was now become patrimonial. But men who had acquired great possessions reflecting on the never ceasing flux of land property from hand to hand, began to work for that stability which the feudal law introduced if it could be obtained without the same slavish dependence. The thirst of man after opulence was not satisfied with the full enjoiment of the goods of fortune, unless it was also in his power to give them perpetual existence. His estate and his heirs must for ever bear his name ; every thing to perpetuate his memory and his wealth. These desires produced in England the stat. *de donis conditionalibus*, entails, authorized by this statute, spread with great rapidity, till becoming a publick nuisance, they were checked and defeated by the authority of the judges, without a statute. In Scotland they are still unrestrained. A great proportion of the land is already exempted from commerce. To this, dead stocks, portions of land are daily adding : and if the legislature interpose not, the time in which the whole will be locked up is not far off. How pernicious this event must be need not be explained. Land-property naturally one of the greatest blessings of life, is thus converted into a curse. That entails are subversive of industry and commerce, is not the worst that can justly be said of them. They are a snare to the thoughtless proprietor, who even by a single act, may be entangled past hope of relief, to the cautious again they are a perpetual source of discontent, by subverting that liberty and independency, to which all men aspire, with respect to their possessions as well as their persons. *Kai. H. l. tr. 3.*

560. HISTORY OF SECURITIES ON LAND FOR PAIMENT OF DEBT. In Scotland a distinction is made of rights affecting land, viz. property ; and a right burthening or limiting property. The English, without distinguishing property and other rights, concieve every right affecting land, to be an estate in the land. A fee-simple, a fee-tail, a life-rent, a rent-charge, a lease for life, pass all equally under the denomination of estate. In both countries, it was of old a lawful practice to force paiment of debt, by taking at short hand from the debtor, a pledge, which was detained by the creditor, till the debtor repledged the same, by paying the debt, or finding security. This rough practice was in England prohibited by *52. H. 3. c. l.* enacting «that no man take a distress of his neighbor without award of court». But this regulation did not extend to feu-duties or rents, for which the landlord may to this day distrain at short hand. The foundation of this privilege will appear in a clear light by tracing the history of leases in this island. Lands, originally, were occupied by bondmen, who themselves were the property of the landlord, and consequently were not capable of holding any property of their own. But such persons, having no interest to be industrious and being under no compulsion, when not under the eye of their master, were generally lazy, and always careless. This made it eligible to have a freeman to manage the farm; who probably at first got some acres set apart to him for his maintenance and wages. But this not being a sufficient spur to industry, it was found a salutary measure to assume this man as a partner, by communicating to him a proportion of the product in place of wages; by which he came to manage for his own interest as well as that of his master. The next step had a still better effect, entitling the master to a yearly quantity certain, and the overplus to remain with the servant. Thus in Tac. *de mor. Germ.* «*servis, non in nostrum morem, descriptis per familiam ministeriis, utuntur. suam quisque sedem, suos penates regit. frumenti modum dominus, aut pecoris, aut vestis ut colono injungit.*» By this contract, the benefit of the servant's industry accrued wholly to himself; and his indolence or ignorance hurt himself alone. One farther step was necessary to bring this contract to it's due perfection, which was to give the servant a lease for years, without which he is not secure that his industry will turn to his own profit. By a contract in these terms he acquired the name of tenant; because he was entitled to hold the possession for years certain, according to this deduction, the tenant had only a claim by virtue of the contract, for that part of the product to which he was entitled. He had no real lien to found upon in opposition to his landlord's property. The whole fruits, as *pars soli*, belonged to the landlord, while growing upon the ground ; and the act of separating them from the ground could not transfer the property of the remaining fruits, without actual delivery. It is true the tenant, impowered by the contract, could lawfully apply this remainder to his own use : but still while upon the ground, it was the landlord's property ; and for that reason lay open to be attached for paiment of the landlord's debts. Matters were altered in Scotland by a statute giving the lessee a real lien or right on the land ; the consequence of which was that the maxim « *quod satum cedit solo*,» which formerly gave the property to the landlord, was now in favor of the tenant. In England to this day, the creditor in a rent-charge may levy a distress to the extent of what is due to him, without confining the distress to the rent due by the tenant. And indeed this is necessary in England, where it is not the practice to take the land itself in execution. I may proceed to consider the case of a creditor who has a security on land. Rents are divided into Rentservice, Rentcharge, and Rentseck. A rent-charge, must be compleated by the writing alone without possession ; because the creditor, until he have a claim for interest, cannot lawfully take possession or levy rents. And it is evident that possession cannot be necessary to establish a right upon land, while such right admits not of possession. A rent seck is in a different case. The tenants are not personally liable to the creditor ; and the deed which contains no clause of distress, affords no title to take a pledge from them. If therefore they be unwilling to pay their rents to a creditor, he has no remedy but a personal action against the granter of the deed. A tenant it is true acknowledging a rent seck by delivering even a penny in part paiment, puts the creditor in possession, after which a refusal to pay is a disseisin and entitles the creditor to an assize of novel disseisin. But before such possession, a rent seck is no real right, because it gives the creditor no power whatever over the land. The creditor in a rent charge, standing on the same footing with the landlord, hath an easier method of recovering paiment. If the rent is paiable in fruits, he may lay hold of it at short hand, which concludes the process with respect to the tenant. If in money, he lays hold of the goods, considered as the landlord's property : but as they belong in reality to the tenant free of all embargo so soon as the rent is paid, he is entitled to restitution on paiment, or security. But if he be unable to find a surety, or perverse enough to neglect his interest, there was no remedy till the *2. W. M. c. 5*, by which it is enacted « that if they are not replevied within five days, with security for the rent the creditor may sell them. » Thus the form of distraining on a rent-charge was made compleat : but a rent seck was made a very precarious security till *4. Geo. 2. c. 28.* which gives the same remedy by distress and sale in a rent seck as in a rent charge. It is surprising that this execution is still indulged to be followed out by private authority in England, when in all other civilized countries execution is not trusted to any but officers of the law. *Kai. l. tr. 4.*

561. HISTORY OF THE PRIVILEGES OF HEIRS APPARENT IN FEUDAL HOLDINGS TO CONTINUE THE POSSESSION OF THEIR ANCESTORS. « *Feudum est jus in praedio alieno, in perpetuum utendi, fruendi, quod pro beneficio dominus dat ea lege, ut qui accepit, sibi fidem et militiae munus, aliudve servitium exhibeat.* » The feudal contract is distinguished from the others by this circumstance, that land is given for service in place of wages in money. This contract at it's dawn was limited to a time certain. It was afterwards made to subsist during the vassal's life ; and in progress of time was extended to the male issue of the original vassal. It was not the purpose of this contract to transfer the property, but only to give the vassal the profits of the land during his service ; or in other words to give him the usufruct.

To transfer the property would have been inconsistent with the nature of the covenant ; because wages ought not to be perpetual, when the service is but temporary. Hence when the male issue failed, or refused to undertake the services the land returned to the superior. While a feu was for life only, it was the superior's privilege as proprietor, without any formality to take poss'n on the death of the vassal, nor was this privilege lost by making feus hereditary. Every heir hath a year to deliberate whether he will undertake the service, during this period, being entitled to no wages since he submits not to the service, the poss'n must remain with the superior, and supposing the heir offers his service without deliberation, the superior accepting the offer must give orders to introduce him into the land ; and this is termed *renovatio feudi*. The superior has also the interim possñ while the heir is unable to bear arms, i. e., while he is under age ; for a servant has no claim to wages while he is incapable of doing duty. But these interruptions of the possñ are casual and momentary; and the possñ continues to descend from one heir to another in a long train, possñ and enjoiment which are overt acts, and the most beneficial exertions of property, make a strong impression on the vulgar, and produce a notion that the land belongs in property to the family in possñ. Hence it came that the most beneficial part of the property was in popular estimation transferred to the vassal, which notion, thro' the prevalence of general opinion, was adopted by the legislature. This heteroclite notion produced another, that after the vassal's death, the heir and not the superior is entitled to possess the land. This produced a law in H. 2. enacting that the heir of full age should continue his father's seisin, doing afterwards for his relief as he ought to do. Then came *52.* H. *3.* c. *16.* providing remedies for such an heir if excluded ; and also entitling an heir, who was under age at the death of his ancestor, to recover the possñ when at full age without necessity of a service or any other formality. But these regulations did not extend to the king's military vassals, who continued under the rigor of the old law till *12. Car. 2. c. 24.* by which all military tenures were abolished. Kai. *L. tr. 5.*

562. History of courts. Where a state is extensive, many judges are required for an accurate and expeditious distribution of justice. If there must be a number, it is better to distribute among them the different branches of law. It is here as in a manufacture. An artificer confined to one branch, becomes more expert than where he is emploied successively in many. Therefore as a man may be injured in his person, his property, and his reputation, courts are accordingly divided into Criminal, Civil, and Ecclesiastical. More minute divisions would be inconvenient, because the boundaries could not be accurately ascertained. This is the primary boundary of jurisdictions, the next is that of territory ; where the extent of the state requires different sets of judges, whose jurisdiction may be separated by the natural marches and boundaries of provinces. But judges subject to no review soon become arbitrary. Hence in all well regulated states there is a court established as the last resort to review the proceedings of all other courts ; and having no original jurisdiction of it's own. This may be properly called a court of appeals : and such is the house of Lords in Britain (— with respect to injuries done a man's reputation, one of the branches of jurisdiction, I am uncertain whether in England any verbal injury is actionable unless it may be attended with pecuniary damage. In Scotland any scandal or imputation on a man's good name may be sued before the ecclesiastical court : it is sufficient to say I am hurt in my character. —) When the different branches of jurisdiction were distributed among different courts, great care was at first taken to confine each court within it's own limits. If in trying any matter, an incidental question occurred which belonged to another court, the cause was stayed till that question was tried in it's proper court. The expense and delay of this method produced in Scotland an enlargement of jurisdiction, by impowering every court to decide in all points necessary to a final conclusion of the cause. Nor is the hazard of contrary judgments considerable. They cannot produce a conflict of jurisdictions for tho' two courts handling occasionally the same point in different causes may be of different opinions ; yet as the suit in different courts is always for different purposes, the execution of their judgments cannot interfere. For example : goods are seised as prohibited : the owner brings an action for them in the civil court, and the judges being of opinion they are not prohibited decree restitution. In the meantime a process is brought in the exchequer in which they are found prohibited, and adjudged to the king. This judgment transferring the property to the king relieves the officer of the former court from making restitution : and yet if he be fined by the justices their sentence must be so far effectual ; the judgment of the exchequer not being sufficient to relieve him from the fine. — I proceed to consider courts as distinguished by territorial limits. A territorial judge having authority over all persons, and things within his territory, I shall first take under view actions which relate to persons. With respect to these it is a rule that « *actor sequitur forum rei* ». The reason is, the pl. must apply to that judge who has authority over his party ; that is to the judge of the territory where he dwells ; for persons who come only occasionally within his territory are not subjected to him. There is a plain rule established in practice to determine where his domicil is, viz., his last residence for forty days. Yet there is no inconsistence in a man's having two domicils at the same time, which subject him to two jurisdictions. On the other hand he may have no domicil, as a soldier ; in which case he is subject to the jurisdiction in which he is found. Territorial jurisdiction was originally as strictly confined as the jurisdiction between courts of different kinds. To found an action it was not sufficient that the def. lived within the territory, if the cause of action did not also arise within it. While men were stationary and their commercial dealings confined to the neighborhood, this was tolerable : but after they were put in motion by extensive commerce it was impracticable. Therefore was the court of the constable and marshal established in England to try all actions founded on contracts, delicts, or facts which happened in foreign parts, this court was much frequented while the English had a footing in France. After their conquests there were abandoned, the court by want of business dwindled to nothing. A contrivance was then fallen on to bring before the courts of Westminster the few causes of this nature that occurred. The cause of action is set forth in the declaration as having happened in some particular place in England, this fact is neither necessary to be proved nor lawful to be traversed. To the rule that « *actor sequitur forum rei* » there are some exceptions in favor of the pl. as a covenant, a delict, nativity. A covenant bestows jurisdiction on the judge of the territory where it is to be performed, if the party be caught there. A delict in the same manner gives the judge where it is committed a jurisdiction, if the delinquent be found in his territory ; on the maxim that crimes must be tried and punished where the yare committed. Nativity, or the *locus originis*, while jurisdiction was confined to the clan only, was the sole circumstance which gave the chieftain or judge jurisdiction. When commerce occasioned an intermixture of clans, the *locus originis* gave way to territorial jurisdiction, and became itself a mighty slight affair. The law of nations indulges individuals to change their country, and fix their residence where they can better find bread than at home. It would be unreasonable to subject a man to the laws of his native country after he has deserted it, and is perhaps naturalized in the country where he is settled for life. Even to punish prisoners of war, as traitors, merely because they were born in the country where they are prisoners, is at present scarce thought rational. Nativity then, with respect to the present subject, stands on the same footing with contracts and delicts. Like the *locus contractus*, and *locus delicti*, the *locus originis* will found a jurisdiction if the party be found within the territory. They exclude the privilege of a domicil, and subject a party to a jurisdiction where he hath not a residence. Thus covenant, delict, nativity, domicil found a jurisdiction : but if the judge has no jurisdiction, and the def. consents to be tried by him, this makes the judgment effectual. This however is advanced with this limitation that the want of jurisdiction must respect the person of the def., and not the nature of the cause. For if the cause be of such a kind that the judge cannot take cognizance of it, consent alone will not found a jurisdiction. Still different from this is the privilege which some have of removing all their causes to a particular court. For instance the attornies of R. B.: acquiescence here under any other jurisdiction is not acknowledging an authority where there was none, but merely waiving a privilege. For a court which hath a radical jurisdiction is in no need of such an acknowledgment : but if the def. omits to use his privilege, it proceeds by virtue of it's original jurisdiction. — I proceed to actions which respect things. When the subject is in one territory and the proprietor within another, before which judge should the action be brought ? The answer is, that where the conclusion regards the subject, that judge must be chosen who has authority over it, viz. the judge of the territory where it is situated. But then a difficulty occurs, the proprietor ought in common justice to have notice, in order that he may defend his interest : and yet he cannot be summoned by a judge within whose territory he resides not. Some method of notification should be contrived.

— Advancing to our courts considered as superior and inferior, I observe that the common method of seeking redress of injustice done by an inferior court, is appealing to a superior. This is the more natural remedy, because it resembles an appeal to a common friend in private life, but reductions and suspensions (similar to the writ of error in England) have more the air of a compleat legal police. These actions proceed on authority of letters from the king, who, by the form of the action is conceived to be watchfull over the welfare of his people and attentive that justice be done them; in order to do which he brings the cause before his own court, where he is more confident that justice will be impartially distributed. These actions redress error after a final judgment, but an advocation or *Certiorari* is the form for doing it before final sentence, and is granted for a delay or refusal of justice, or where there is suspicion of partiality in the judge below. — Iniquity in judges may be redressed, but iniquity in the verdict of a jury is subject to no review. Every thing that was sworn by a witness was held by our forefathers to be true; a position which indicates great integrity and simplicity of manners, but little knowledge of mankind. Hence a verdict was preserved entire, even where it was proved iniquitous, and a punishment inflicted on the jury for their perjury. This is singular. It is both common and rational to redress a wrong with relation to the party grieved, without proceeding to punish the wrong-doer. But it is uncommon and irrational, to punish a delinquent without affording any relief to the party injured. As to the use of juries a maxim seems to have had weight with our forefathers, «that tho' questions in law may be trusted to a single judge, matters of proof are safest in the hands of a plurality». It was probably thought that in determining questions of law there is little trust reposed in the judge because he is tied down to a precise rule: but that as no precise rule could be laid down in matters of evidence, they should be referred to a number of judges, who might be a check on one another. Thus we see that in all courts where the judges were few, juries were used ; but in such as were numerous the judges act both as judges and jurors ; as in the house of lords, the court of session.—Tho' the distinctions above mentioned comprehend most of the courts of Britain, they do not comprehend the whole. We have many instances of new jurisdictions erected for particular purposes. This generally happens where an act is made criminal which was not so before, or where an additional punishment is inflicted on what was before a more venial transgression, and certain persons appointed to try it. With relation to these courts the question of greatest importance is: Whether they are subject to review. Bac. *abr. v. 1. p. 592.* sais « the king's bench hath so sovereign a jurisdicting in all criminal matters, that an act appointed certain crimes to be tried before particular judges, doth not exclude the jurisdiction of this court without express negative words. But where a stat. creates a new offence, erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such case. » This distinction is solidly founded on a clear rule: A right established in any court or person, is not presumed to be taken away ; and therefore cannot be taken away but by express words. On the other hand a right is not presumed to be given, and therefore cannot be given but by express words. The superior court indeed may try a preliminary point in such causes, whether they be within the limits of the new court ; but there they must stop short, and cannot interfere however wrong the judgment may appear to be. *Kai. L. tr. 7.*

563. HISTORY OF BRIEVES. The chieftain or king was originally sole judge in matters of importance. But in the progress of society, being involved in the greater affairs of government, he instituted courts, and distributed among them the several branches of civil, criminal, and ecclesiastical jurisdiction. But jealous of his authority he bestowed on them no other power but that of jurisdiction in it's strictest sense, viz. a power to declare what was law, reserving to himself all magisterial authority. Therefore with relation to sovereign courts, citation and execution proceed in the king's name, and by his special authority. As to inferior courts, all authority is given to them which is necessary for explicating their jurisdiction. The trust is not great, considering that an appeal lies to the sovereign court; and it is below the dignity of the crown to act in an inferior court. In the infancy of government the danger was not perceived of trusting with the king both the judicative and executive powers of the law. But it being now understood, that the safety of a free government depends on balancing it's several powers, it has become an established maxim that the king, with whom the executive part of the law is trusted, has no part in the judicative power, and therefore (1) cannot sit in any of his courts as judge. It behoved often to be doubtful in what court a new action should be tried. An expeditious method was invented for resolving doubts of this kind. The king was the fountain of jurisdiction, and to him was ascribed the prerogative of delegating to what judge he thought proper, any cause that occured. This was done by a brieve from the chancery, directed to some established judge, ordering him to try the particular case mentioned in the brieve. The king at first was under no restraint as to the choice of the judge, other than what arose from rational motives, but reason produced custom, and custom became law. Matters of moment behoved to be delegated to the supreme judge, and it became a rule not to mix civil and criminal jurisdiction. Brieves respecting judicial proceedings are of two kinds. One is directed to the sheriff ordering him to cite the party to appear in the king's court, to answer the complaint made agt. him. The other is directed to a judge, delegating to him the power of trying the particular cause set forth in the brieve ; as a writ of mort ancestry, novel-disseisin, etc. — Of old a certain form of words was established for every sort of action ; and if a man could not bring his case under any established form, he had no remedy, but in the progress of law, new cases occurring without end, to which no established form corresponded, produced, in Rome *actiones in factum*, and in England actions on the case. *Kai. L. tr. 8.*

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(1) State trials. Hampden's ca. contrary said by Lyttleton. Sollic. Gen. *Note of Jefferson.*

564. HISTORY OF PROCESS IN ABSENCE. Litiscontestation depended originally on the consent of the parties to leave the decision of their differences to some judge, who without such consent could not force parties to appear before him. This notion of jurisdiction produced a rule which continues to this day in England, that no cause can be tried in absence. This is a great obstruction to the cause of justice, for instead of trying the cause and awarding exñ if the claim be found just, it has forced the English courts on a wide circuit of pains and penalties. The refusing to submit to a court is a crime of the grossest nature, being an act of rebellion agt. the state. It is justly thought that the person who refuses to submit to the laws of his country ought not to be under the protection of those laws. He is therefore held a rebel, or an outlaw : he hath not *personam standi in judicio* ; he may be killed *impune* : and his liferent and single escheat fall. The horror of the grosser crimes hath introduced a regulation beyond the common law that outlawry in the case of felony, subjects the party to the very punishment which is inflicted on a felon convict. The same in treason, corruption of blood excepted. There was no need for a circuit with relation to other crimes, because the punishment of outlawry, by the common law, equals the punishment of any other crime. Hence the reason why death before trial is a bar to all penalties. The crime cannot be tried in absence and after death there can be no contempt for not appearing. Lawyers have generally but an unhappy talent at reformation; for they seldom aim at the root of the evil. A superstitious attachment to ancient forms hath led English lawyers into a glaring absurdity. To prevent the hazard of injustice there must not be such a thing as a trial in the absence of the party. Yet no difficulty is made to presume a man guilty in absence without a trial, and proceed to punishment. It is glaring in another instance. The English adhere so strictly to the original notion of jurisdiction being founded on consent, that there can be no process unless the def. appear and submit by pleading. Therefore if he stands mute they have a peculiar punishment called *peine fort et dure*. As to a trial after death which was allowed among the Romans, there are two reasons agt. it: 1. resentment, the spring and foundation of punishment ought to be buried with the criminal. 2. the relations being unacquainted with the private history of the deceased, have not the same means of justification which he would have had. *Kai. L. tr. 9.*

565. HISTORY OF EXECUTION AGAINST MOVEABLES AND LAND FOR PAIMENT OF DEBT. Against a debtor refractory or negligent, the proper legal remedy is to lay hold of his effects for paying his creditors. Among other remarkable innovations of the feudal law, one is, that land was withdrawn from commerce, and could not be attached for paiment of debt. Neither could the vassal be attached personally, because he was bound personally to the superior for service. Moveables, therefore, which were always the chief subject of execution, came now to be the only subject. In England they were attached by warrant of the king's letter directed to the sheriff, called a fieri facias. This is (1) defective in one respect that the creditor is disappointed if no purchaser is found. Land when left free to commerce by dissolution of the feudal fetters, was of course subjected to ex'n for paim't of debt. This was early introduced with relation to the king. For from *Mag. Char.* c. *8.* it appears to have been the king's privilege, failing goods and chattels, to take possñ of the land, till the debt was paid : and that the like privilege was bestowed on a security to draw paim't for the money he had advanced. By the statute merchant the same privilege was given to merchants, and by 13. E. 1. c. 18, the privilege was communicated to creditors in general ; but with this remarkeable limitation, that they are allowed to possess only the half of the land. By this time it was settled that the military vassal's power of aliening, reached the half only of his freehold, and it was thought incongruous to take from the debtor, by force of execution, what he himself could not dispose of, even for the most valuable consideration. An elegit, even for this half, is only a legal security, having no other effect but to put the creditor in possession till the debt be paid, by levying the rents and profits. This is an inconvenient method of drawing paiment : but the English, tenacious of their customs, never think of making improvements, or even of supplying legal defects. The elegit was given when the proprietor could dispose himself but of half his land : he can now dispose of the whole, yet the execution has not been enlarged. Some indirect means are contrived to supply this defect. Any other creditor may seize half of the remaining land, and so on without end. Thus by strictly adhering to form without regarding substance, law instead of a rational service, becomes a heap of subterfuges and incongruities, which tend insensibly to corrupt the morals of those who make law their profession. *Kai. L. tr. 10.*

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(1) But this is supplied by the vendit. expon. *Note of Jefferson.*

566. HISTORY OF PERSONAL EXECUTION FOR PAIMENT OF DEBT. The subjects that lie open to execution for paiment of debt are 1. the debtor's moveables. 2. his land. 3. his person. The two former have been discussed. We proceed to the history of the latter. Personal exñ for paiment of debt, was introduced after execution agt. land, and long after execution agt. moveables; nor will this appear singular, when we consider, that the debtor's person cannot, like his land or moveables, be converted into money for the paiment of debt, and with regard to a vassal in particular, his person cannot regularly be withdrawn from the service he owes his superior. This would not have been tolerated while the feudal law was in vigor, and came to be indulged in the decline of that law, when land was improved, and personal services were less valued then pecuniary casualties. The first stat. introducing personal exñ was *11. E. 1.* directed agt. the inhabitants of royal burrows, subjecting their moveables and burrow lands to be sold in the first place, and failing these, their bodies to be imprisoned till agreement with the creditor. The 13. *E. 1.* made it lawful to commit him in the first step on refusal to pay, which is still done by a ca. sa. Imprisonment on failure of paiment, whether considered as a punishment or as a compulsion, must proceed on the supposition of contumacy and unwillingness to pay, for on a supposition of inability, without any fault on the debtor's part, it is not only repugnant to the plainest principles of law, to punish him with loss of liberty, but an absurd regulation, tending to no good end. *Kai. L. tr. 11.*

567. HISTORY OF EXECUTION FOR OBTAINING PAIMENT AFTER THE DEATH OF THE DEBTOR. When money is lent, it is the duty of the debtor to pay the sum at the term covenanted, and to procure money by a sale of his goods, if he cannot otherwise satisfy his creditor. If he be refractory or negligent, a judge interposes, and directs a sale. In what manner debts are to be made effectual after the debtor's death, by the rules of common justice, is a speculation more involved. If no heir appear the same remedy may be applied as in the debtor's life: for it is not so great a stretch in the law by a sale to supply the defect of will, which it is to be presumed the debtor would have interposed had he been alive, as to wrest his property from him in his life against his will. But an heir appears to whom the property is transferred by succession. Justice will not allow him to enjoy the heritage of his ancestor without acknowledging his debts. Therefore if he submit not to pay the whole debts, he must either account to the creditors for the value of the heritage, or consent to a sale for their behoof. The latter is the better method, 1. because the creditors have an equitable claim to the effects of the debtor, but not against his relations : 2 because a sale, being the only unexceptionable method of determining the value of a commercial subject, is prefereable to the more uncertain opinion of witnesses, for the affection of the heir to the particular subjects ought not to weigh against creditors *certantes de damno evitando*, and especially as that affection may be gratified by offering the smallest sum above what another deems the intrinsic value. To understand the spirit of the English law, it must be premised, that while the feudal law was in it's purity, a vassal had no land property : he had only the profits of the land for his wages : and when he died, his service being at an end, there could no longer be a claim for wages. The subject returned to the superior and he drew the whole profits, till the heir appeared ; who was entitled by the original covenant, on performing the same service with his ancestor, to demand possession of the land as his wages. Thus the heir's title was a new grant to him from the superior, and this was called *renovatio feudi*. Nothing appears here to subject the heir to the ancestor's debts, but after land was restored to commerce, and a vassal was understood to be in some sort proprietor, so as even to have a power of alienation, it was a natural consequence to subject it to debts, even after death, for why may not land as well as moveables be attached for the debts of him who is equally proprietor of both. Accordingly by the law of England (1), « judgments of all kinds may be made effectual by an elegit, before or after death, without a new judgment agt. the heir. » Nay further (2) « lands are bound from the time of the judgment tho' aliened *bona fide* afterwards. » So where there is no judgment, with this difference only, that a decree must be taken out agt. the heir; which is a (3) « foundation for attaching the deceased debtor's heritage, but not to have any personal effect agt. the heir, nor his proper estate. » This practice depends on a principle of justice, that every man's proper effects ought to be applied to paiment of his debts. His death can have no such effect naturally, as to withdraw them from his creditors; nor as to subject the heir for debts which he did not contract. In England the ancestor's estate is vested in the heir without his exerting any act of possn̄ : and justly ; his *animus possidendi* is presumed, and must alwais be presumed where the apprehending possn̄ is attended with no risk. This is the sense of the maxim « *quod mortuus sasit vivum.* » This branch of the law of England is beautiful for it's simplicity, it's equity, and it's expediency. Nothing can be more simple or expedient than by mere survivance to vest in the heir the estate that belonged to the ancestor : and nothing more equitable than a *separatio bonorum*, by which the funds of the ancestor are set apart for paiment of his debts. — A pure donation, which doth not subject the donee to any obligation, transfers property without the necessity of acceptance ; hence infants and absents are benefited by such deeds without knowing anything of the matter, but a deed laying the donee under any burden, bestows no right without actual acceptance. Therefore the maxim « *mortuus sasit vivum* » is just where the heir is not subjected personally to the ancestor's debts. *Kai. L. tr. 12.*

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(1) 2. Bac. abr. 337. *Note of Kames.*
(2) 2. Bac. abr. 361. *Note of Kames.*
(3) 3. Bac. abr. 25. *Note of Kames*

568. The English law deviates from natural justice, in distinguishing between the heretable and moveable debts, subjecting the heir to the former only, and the exr to the latter. Creditors may thus lose their debts, tho' the debtor die in opulent circumstances : as when his moveable funds are narrow, and his moveable debts extensive. It furnishes too an opportunity for fraud, for what if a man with a view to disappoint his personal creditors, lays out all his money in land ? I know of no remedy to this evil, unless the Chancellor moved by a principle of equity, venture to interpose. *Kai. L. tr. 13.*

569. HISTORY OF THE INTRODUCTION OF THE FEUDAL SYSTEM IN GREAT BRITAIN (1). The northern nations who overran Europe fought not for glory or dominion, but for habitations. As they were armies, they would fall into subordination in their settlement ; as they were in continual danger, and their genius led that way, their institutions would be military ; and this subordination, and obligation to military service carried in themselves a system of laws, which would naturally be established by every one of these nations, however different in their dialects, separated by seas and mountains, unconnected by alliances, and often at enmity with each other. The SAXONS like the other northern nations, had their princes and chieftains. They had likewise their slaves, who were labourers of land, and paid in return a certain quantity of cloath, and corn and cattle. When such a people settled in a foreign country, certain portions of the land would be reserved for the prince, and the rest parcelled out among the chieftains. The prince and chieftains again would settle on their lands, their followers of an inferior degree, and their slaves, nor was the whole of the land so distributed. This was more than the conquerors had occasion for. Such of the antient inhabitants then as were allowed to live in the country, kept their lands on the antient footing ; such of the intruders too as were not attached to any chieftain, taking possñ of any vacant land they found, enjoyed it on the same footing : both held their possñs at first without any grant from the prince, and when writing came in, without writing. This was the distinction between Allodial, or Boc-land or Folkland, and Feudal or Thane-land, or Reve-land. But it was necessary to subject in a political capacity those who were not subjected in a feudal. The Allodial lands were therefore divided into Counties, these into Trythings, or Ridings, and these into Hundreds ; over which were appointed Counts or Earls, Vicecomites Aldermanni et Prepositi Hundredorum. But among the Saxons the rights of the rear-vassals were very imperfect, the grants under the land being never hereditary. William duke of Normandy, came from a country where the greater power of the prince had sooner rivetted the feudal duties on the crown vassals, and had given time and room for the rights of the rear-vassals to ripen. These were by him transplanted into England. He abolished the distinction between allodial and feudal lands, making the former as well as the latter to be held by military tenures. He attached large territories to the title of Earl, making these honors seignoral and hereditary, but the whole fiefs of the nation, the lower as well as higher, became hereditary and acquired firmness. Accordingly we observe in this and the two reigns immediately following, all the effects start up which necessarily would follow a general extension of this kind ; escheats, wards, marriages, etc. of which we find no vestiges in the Saxon law, and to which the independency of the Saxons would never have submitted. *Dalrymple's History of Feudal property. Ch. 1* (1).

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(1) Sir John Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain. With a History of the Introduction of the Feudal System in Great Britain.* London, 1757.

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(1) **For the influence of these theories on Jefferson, see *Introduction*, p. 52.**

570. HISTORY OF TENURES. As the principles of the feudal system were founded in conquest, and all it's relations tended to preserve and defend that conquest, most fiefs were originally held by military services, insomuch that if no service was reserved in the grant, the law presumed the tenure of knight's service to have been intended. A part of the lands were given to Sokmen, or husbandmen who paid in return corn, cattle, and cloaths, a part also was laboured by the Villains, or slaves, for the behoof of their masters. In the earlier ages Socmen were in little estimation ; but as times grew more peaceable, and military services consequently of less value, superiors ran much into the practice of exchanging these, for the services of agriculture. The same peaceable manners made the minds of men be shocked with the bondage of their fellow creatures : villains were infranchised, and their tenure of villenage converted into soccage. Thus knight's-service sinking, and villenage rising in dignity, were gradually converted into Soccage. Tenants in Socage at first, paid the actual service of the plough, afterwards they paid a certain rent in corn, and cattle, and at a later period this was converted into money. The most martial nation must have some artificers. These seeing no security for themselves in the country, either retired into the antient Roman towns, or built new towns for themselves near the castles of their superiors. These settlements were encouraged, and being under protection of the princes and lords, paid in return some small rents. They had franchisements and privileges bestowed on them, and thus a new, feudal, free tenure, called Burgage, was brought into the law. Originally when lands were given to the church, they were burthened with military services. When these became less valuable, no other return was exacted but prayers and religious exercises, and this tenure was termed Frank-Almoigne. Thus the several orders that were of value in the state, the soldiers, husbandmen, artizans and clergy gave rise to the four simple tenures of Knights-service, socage, burgage, and frankalmoigne, into which all others may be resolved. Knights-service was distinguished into various tenures : castle guard, grand serjeanty, escuage. The tenants by the latter attended the king in person on foreign expeditions, and were the most numerous. They were at first obliged to attend in person. Afterwards they were indulged with sending a deputy ; and in process of time, with paying a sum of money in compensation. This produced the distinction between escuage certain, where this compensation was fixed by the parties themselves in the charter of grant ; and escuage incertain, where it was left to be assessed by parliament. The former was a mere socage tenure, and in time was deemed only subject to the duties of it : the latter was still a military holding, and subject to the duties of ward and marriage. *Dalr. H. F. P. c. 2, sect. 1.*

571. FRUITS OF TENURES. Antiently almost all the lands were held by military tenures. The lord was protector, the tenant only usufructuary. The use of the land being intended only as wages for the vassal's service, the grants would determine on his death. When the favor of the heir produced grants to a man and his heirs, it was still just that during the heir's inability to perform the services the fief should return to the lord, and indeed in these boisterous times it was a favor to the heir to take both him and the fief under the protection of the lord. This produced the right of Ward. — In such a situation it was congruous too that the tenant should not bring into the fief one who was perhaps an enemy to the lord. Hence flowed the right of the lord to dispose of his vassal in Marriage. There was an obvious distinction between the marriage of a male and a female heir. Therefore a male heir on refusing to marry the woman whom his superior offered him, paid only the single value of the marriage, and for marrying without his consent, the double. Whereas a female heir in that case forfeited the heritage: nay a widow marrying without consent of her husband's heir forfeited her dower. However in the end, the heirs female came to be in the same situation as the male. — After the heir was concieved to have a right to his predecessor's possessions, the obligation on the superior to receive the heir was not concieved to be absolute; and even tho' it had, as it was not easy to force him to fulfil it, heirs were contented to make a present to the lord for their entries, called a Relief, or *Relevatio feudi*. — In the origin of the feudal law this present consisted of armor. Therefore among the Saxons the king had a right to take a quantity of warlike accoutrements from the goods of the deceased vassal, which were termed Heriots. But when money came to be more in request than armor the heriot was changed into a relief, or the paiment of a stated sum of money. Reliefs were originally peculiar to military tenures; but a right so beneficial to the superior would be quickly extended over soccage tenants. This was fixed by the law at a year's rent, and was afterwards made the measure of relief for a military tenant. — According to the strict feudal principles the vassal could not alien without consent of the lord, to gain which it was natural to make a present. Custom as usual was erected into a right, and produced the Fine of Alienation; which was a year's rent. And indeed if it was just that the heir should give a present on the renovation of this grant, it was more so on the alienation of the fief, when a stranger was introduced. To avoid this fine, vassals got into a way of alienating, so as to make the new vassals hold of themselves, and not of the superior: by which the superior lost many of the fruits of his superiority. To correct this practice the stat. *Quia emptores terrarum* was made, allowing vassals to alienate freely, but making the alienees hold of the superior, not of the vassal. This restored superiors to their fruits. — The extreme dependance of vassals on their superiors at first, and the great cordiality between both afterwards produced the incident of Aids, which were at first benevolencies, given during the great festivity, or the great necessity of the lord, to wit, when his son was to be knighted, his daughter to be married, or his person ransomed. These were soon changed into duties. They were originally peculiar to military fiefs, but were soon extended to others. Taxes were originally no part of the Gothick constitution. The king was supported by the rents of the demesne lands, and incidents of the feudal tenures. Hence when the kings levied taxes, they pretended to recieve them as voluntary contributions. Things could not stand long on this footing : thro' the decline of the feudal system, the feudal emoluments were become less, and a land tax was necessary. But it was dangerous to allow the king to lay it on at pleasure, and therefore it was provided *25. E. I*, that the king should not lay new aids without consent of parliament. The rise of the great families on the power of the crown first stripped the king of the power of laying on a land tax ; the rise of the commons on both, stripped both of this power, and now in Britain the laying taxes from a *consuetudo* much stronger than any statute, belongs not so properly to the parliament, as to the house of commons. — The incident of Escheat is an effect produced by the original situation of superior and vassal.This was on the delinquency of the vassal which made him unworthy of the feud ; and on his death without an heir to perform the services in both cases the land escheated to the lord. It is remarkeable that when lands escheated for a crime, they went to the king for a year and day. This must be accounted for ; as the land belonged to the lord, when the vassal became unworthy to enjoy it, it reverted to the proprietor. But the moveables being acquired by the industry of the vassal were deemed his own ; and for his debt contracted to the public by his crime, were forfeited to it. But time as well as possñ of the land was necessary to gather them in. The use made of this was to carry off everything that could be moved, and to destroy what could not be carried off, in order to increase the penalty. To prevent this the lord came into the practice of giving a whole year's rent, for the king's right of waste. This was confined to real offences, for in outlawry on a civil action, the king took only the profits till the reversal of the outlawry, or death of the party. Treason is the single instance in which on account of the heinousness and public nature of the crime the law of escheat to the lord was made to give way to the law of Forfeiture to the king. Yet in this the original law of escheat may be traced; for example, on a vassal's delinquency the lands returned to the superior in the same condition in which they had gone from him. In consequence of this he was concieved to have a right to resume the lands without being subject to the encumbrances of the vassal. In England to this day, the old rule of escheat that lands should revert free of burthens, so far prevails in forfieture, that they revert to the king disburthened of dower : and tho' the king on forfieture for civil debt satisfies the creditor, at whose suit the outlawry is prosecuted, yet according to L. Coke, he does this *de gratia*, and not *de jure*. The law of escheat is still further to be seen in the law of forfieture in this that if an estate devolves on a traitor jure *sanguinis*, it escheated to the lord as *ultimus haeres*, and was not forfeited to the king. Bastards in many respects were deemed a kind of criminal in the eye of the law : they were not allowed to make testaments, they could not have any heir, but of their bodies : and hence at one period their lands were forfieted to the king, and did not escheat to the lord. When the succession fell, it seemed to fall as if for a crime. *Dalr. H. F. P. ch. 2. sect. 2.*

572. PRESENT STATE OF TENURES. The connection between lord and vassal, was the basis of the feudal system ; the declension of that connection involved the ruin of the system. Tenures by FRANKALMOIGNE preserving too little connection between lord and vassal at a time when much was required, were restrained by the statutes of mortmain, and finally barred by the stat. *Quia empt. terrarum.* — MILITARY tenure preserving too much connection down to times when little was necessary shared the same fate at a later period. — Tenures by SOCCAGE and BURGAGE being moderate have to this day a stable duration, and in England (1) have run into each other. — The severity of NONENTRY lasted but a short time in favor of the lord : and the king by 3. E. I. c. 24. was restrained from taking possñ till an office was found, that is, till he was authorized by the verdict of an inquest. — NONENTRY, and RELIEF were overwhelmed in the fall of the court of wards and liveries. Aids were abolished at the same time with a knights-service ; and WARDS, MARRIAGES, and the other incidents of military tenures were laid forever to rest in 12. C. 2. They were purchased of the crown by a perpetual grant of one half the excise. The only remains of aids is to be seen in the custom of parliament to grant an aid for the dowry of the king's eldest daughter ; for which respect to the land tax it is rather a political than a feudal part of the constitution. ESCHEATS: are still remaining, and when they happen for default of an heir, the lands revert to the donor, if by any stretch of interpretation, he can be supposed to have an interest reserved in the land. *Dalr. Hist. F. P. ch. 2 sect. 3.*

573. HISTORY OF THE ALIENATION OF LAND PROPERTY. Voluntary alienation. The right of excluding all others from a particular spot of ground is one step in the progress of the idea of property ; but the right of transferring it to another, is a second and a wider. A man holds his land during his own life, and at his death his children being connected with him and with the spot of ground, continue his right of exclusion. When with these restraints in favor of the heir, the influence of feudal

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(1) Lyt. sect. 162. *Note of Jefferson.*

principles chances to concur, the bar to alienation becomes double. The first step of the alienation of land property in Britain, was the power of aliening a man's own acquisitions. But if he had a son, he could alien but the half of these. The alienation of conquest paved the way for the alienation of what had come by descent. At first only a part of this last was allowed to be aliened, and that not *cui velit*, but only on very reasonable motives : as on a principle of gratitude, in frank marriage, in free alms. It is probable that the first free voluntary alienation of land in England arose among the trading people in burroughs, their holdings not being strict, and themselves in a more improved state of society. In soccage tenures, the interest of the lord not being great, these lands would next become alienable ; and as the strictness of the feudal system wore off, the propensity to alienation in military holdings was so great, as to need a restraint in magna charta, viz. « *nullus det amplius alicui, quam ut de residio terrae possit sufficienter fieri domino feudi, servitium ei debitum.* » The practice of subfeuing facilitated alienation ; for as the original vassal remained still liable for the whole services, which might be distrained in any part of the land, sub-infeudation was scarce accounted an alienation. But in process of time, the rear-vassal having possessed his feud long and held it of another, began to think himself only connected with that other, and not with the original lord, by which the superiors were deprived of their emoluments. To remedy this the stat. *Quia emptores* gave free liberty to vassals to alienate the whole, but provided that the alienee should hold of the lord. At length by the fall of tenures in *Car. 2.* voluntary alienation of land was brought to perfection. *Dalr. H. F. P. ch. 3. sect. 1.*

574. **INVOLUNTARY ALIENATION.** The notion of borrowing under a promise of paying, is not very natural among a rude people ; their conception of obligation is but weak in any case, and that of their obligation to fidelity still weaker. The borrower would therefore give a pledge as a security, which on failure of paiment, either remained with the creditor, or on application to the judge was sold by his order. The progress of the attachment of immoveables is the same. They could not be attãd for debt by the Saxon laws, nor for several reigns after that of William the conqueror. The only writs of exñ were the *fi fa.* and *levari fa.* It is true, by Glanville, lands might be pledged, and on failure, either retained, or sold by the creditor, but this being in consequence of the agreement, belonged rather to voluntary than involuntary alienation. As voluntary alienation of land was first introduced among trading people in boroughs, so was involuntary alienation. Thus the statute merchant, in *13. E. l.* allowed the creditor, if a merchant, to take possñ of the whole of the debtor's land till he was paid off. It is true, in the same year, an Elegit was given to the subjects in general, but this extended but to the half of the lands, which before the stat. *Quia emplores* was as much as the debtor could alien. Two reigns after this, *27. E. 3. c. 9.* the statute staple was invented, giving the benefit of the stat. merchant in all contracts made within the staple. The *23. H. 8. c. 6.* allowed in every case a recognisance to be taken before the chief justice of R. B. or C. B., the mayor of the staple at Westminster, or the recorder of London, and the same proceedings thereon as on the stat. merchant. When land came to be absolutely in commerce, the *13. Eliz. c. 7.* and the subsequent acts concerning bankrupts, established a *compleat* attamt of lands belonging to the persons specified in these acts. Instead of a half, the whole was made liable; instead of the possñ only which was given by the stat. stap. stat. merc. and Elegit, a power of selling was given. By the interpretation of the judges these statutes of bankrupts have been extended further to many different classes of tradesmen and mechanics: and tho' they do not relate to the rest of the subjects yet, generations will see them extended to the whole. The *compleat* attam̃t of land now established among merchants, will in the end by a train of causes and effects, as absolute in the political as in the natural world, affect the property of all landed men. When a progress is uniform in it's movement, and constant in it's direction, there is no great arrogance in prophesying where it will end. — If there was so much difficulty in bringing in the attam̃t of the lands of the debtor himself, there must have been more, where they were in the hands of the heir; he had not contracted the debt, and the fief was bound for the services of the lord. By the same plan of analogy, this would begin first among traders. Accordingly the stat. merchant declares if the debtor die, the merchant shall have possñ of the lands, until he hath levied his debt. — On a review of this deduction, it is no pleasing reflection to observe, that after the consummation of centuries, the law of England labors under this defect, that unless a man is of a certain denomination to come under the statutes of trading bankrupts, the creditor gets a distant, not an immediate paiment, the possession not the property, in some cases of the half, in others of the whole of the debtor's land. The day will probably come when all land becoming allodial, and the more compleat and easy attam̃t of it necessary, the rule of the Roman emperor in the Pandects, made when the feudal relation and the bar to the alienation of land property consequent on them were unknown, will be the law of the world. This was that a portion of the moveables equivalent to the debt should first be sold; if these did not suffice, that an equivalent portion of the land should be sold; and if no purchaser appeared that it should become the property of the creditor. *Dalr. H. F. P. ch. 3. s. 21.*

575. Alienation by will. From the foregoing deductions of alienation during life, it is plain it would be long before men could have a notion of that alienation which is to take effect after death, which depends on the will of a person now forgot, and against which the favor of the heir is a bar. Thus before the time of Solon, the Athenians could not dispose even of moveables by a testament, nor could the Romans before the time of the twelve tables; and even then testaments were not in by the natural course of things, but were borrowed from the Greeks. Among the Germans Tacitus sais « *haeredes successoresque sui cuique liberi, et nullum testamentum.* » Afterwards men get a notion of disposing by testament of their moveables, and only of a part of these. This was confined to a third by the antient laws of England. The notion of a power over moveables beyond the grave, made way for the notion of the same power over immoveables. But many arts were used to smooth over the difficulty of concieving that a person's will could have any effect when he himself was no more. Thus in the Roman law, before the XII tables inheritances were transferred in *calatis comitiis*, by way of adoption, but the donee took rather as legal than as testamentary heir. In the same manner Glanville sais delivery was necessary to give effect to the deed of the testr. The interval is long between these alienations *mortis causa*, and alienation by barely notifying a few words in a testament. This last was much facilitated by the common use of letters. When I see the will of a man lying on a table before me, he seems present with me, and commanding as if he was alive. This strikes the senses and assists the imagination in tranferring property according to his will. To this the consent of the heir was at first necessary. This as well as the other kinds of alienation first took place in boroughs by *Lit. sect. 167*; from thence it was extended to other parts of the country, partly by interposition of courts of equity, who supplied want of livery to a deed; partly by devices of lawyers, who distinguished between uses and lands, and found out too that a man might direct his exr̃s to alien for certain purposes. This was first for the good of the test'rs soul. Afterwards, as appears by *21. H. 8. c. 4.* it had been extended to debts and legacies ; and as appears again by *27. H. 8. c. 10* people had even devised openly without any of these causes. Henry. 8, in the 23'd of his reign offered the commons a permission to devise half of their lands. On their refusing to accept it, he ordered the power of devising lands to be examined by the judges, and on their determination totally forbade such devises. Four years after, he consented to a statute (*27. H. 8. c. 10*) establishing all wills made for 40 years before, and at length by *32. H. 8. c. l.* and *34. H. 8. c. 5.* unlimited powers of devising were given ; except of lands held by knight's service. But on the abolition of this tenure these lands also became deviseable, and so extensive is the English notion of this power at present, that moveables to any extent whatever may be devised even by a nuncupative testament. *Dalr. H. F. P. ch. 3. sect. 3.*

576. HISTORY OF ENTAILS. After the feudal law had been for some time on the decline, it was again notwithstanding the general bent of men against it, in some degree revived, by the bent of particular persons. The nobles saw that the allowing land to come so much into commerce, should weaken them and shift it into the hands of people who had been formerly little better than slaves. To prevent this the stat. of entails was framed in the reign of E. 1. and extorted from that prince. In process of time, the property of the great families continually increasing, and never diminishing, their power grew to such a height, as enabled them totally to enslave the people, and sometimes to overshadow the crown. In the end however the still progressive increase of commerce gave a more universal and more strong bent for alienation ; and tho' the great lords would not alter the law of entails in parliament, they were greatly discouraged by the judges ; who repressed all devices for perpetuities and new species of entails, and incoraged every invention to elude the old. A common recovery was by a solemn decision in Mildmay's *ca. 6. Co. 40. 6,* in the reign of E. 4, supported as a bar to entail. The politick prince H. 7. who saw that superiority which the preservation of land property in the families of the nobles had given them, got the famous stat. *4. H. 7. 24*, passed, which made a fine with proclamations to conclude all persons, strangers and privies. This stat. had a saving of the rights of persons accruing after ingrossing the fine. A doubt occurred on this whether the issue was barred, and the judges embraced the occasion of barring them. The *32. H. 8. c. 36.* approved the decision. A commercial disposition required an unbounded commerce of lands, the landed men, the monied men, were equally hurt by entails ; the lawyers in their writings had long been inveighing agt. them. These various ranks of men did not foresee the consequences of the dissolutions of entails. It is obvious that the dissipation of church lands by H. 8. and the alienation of a great part of the crown lands added to the dissolution of entails produced that transition of property from the lords to the commons, which so soon after made the commons too powerful for the nobility and the king, so insolent as to vote the nobles no necessary part of the constitution, and by a publick trial and execution to put their sovereign to death. — Till a very late period entails were not subject to forfeiture. Before the stat. *de donis*, lands were divided into fee simple, and fee simple conditional. In the last the donor still retained an interest, and failing the condition, that is, failing issue, the lands reverted to him. Unless the donee had issue therefore, he could not alien or do anything else to the prejudice of the donor ; and if he could not alien, for the same reason he could not forfiet, which was equally prejudicial to the donor. This maxim was extended erroneously in favor of the heir on the introduction of the stat. *de donis*, for tho' it was reasonable there should be no forfeiture to the prejudice of the donor from whom the lands came, and came conditionally, there was no such reason in favor of the heir from whom nothing came. It is entertaining to a philosophical mind to observe the different fates of laws, not only from general causes common to all mankind, but from particular exigences and situations. By a mistaken interpretation the English extended the rule, that he who cannot alienate cannot forfeit, from fee simple conditional to fees tail; and yet when by the devices of lawyers, tenants in tail were allowed to alien, the judges would not allow them capable of forfeiting. This refusal was in the days of civil discord, when the disputes between the houses of York and Lancaster, made the judges fearful, even on the most obvious interpretation, of opening any more doors to forfeiture. When these dangers were over, entails were by *26. H. 8.* subjected to forfeiture as other estates. But this stat. saving the rights of third persons, rem'rmen were considered under that denomination. — Men who were to consider a total dissolution of entails in Scotland, might perhaps foresee that this would bring so much land property into market as from the cheapness occasioned thereby, would call the money out of trade to the purchase of land, as would render our landed men discontented and bankrupt; and he might dread the consequences which attend the innovation of every new system, if not at the exact period of society ripe for that innovation. A lawyer again, inquisitive in tracing laws, their regular progress and declension, would, unmoved by clamor, reflect that the inconveniencies prophecied, tho' plausible in appearance, have hitherto come to nothing, and that if they should ever happen, our entails will share the fate of almost all the other remains of the feudal law, be abolished. Dalr. *H. F. P.* ch. 4.

577. HISTORY OF THE RULES OF DESCENT. Descending line. The feudal system, in it's regulations was orderly and universal. The same regulations governed private as well as public succession. In the dispute between Baliol and Bruce for the crown of Scotland, the parliaments of England and Scotland unanimously declared that the right of succession to the kingdom was to be judged by the rules of counties, baronies and other unpartible tenures. When the nations of Germany first took possession of the Roman provinces (1), they granted to their vassals during pleasure only. These grants were called *munera*. Soon afterwards they made grants for life, termed *beneficia*. It was accounted hard that on the father's death his sons should be turned out of possñ, and superiors considered that it would damp the courage of the bravest spirit to reflect that the loss of his life would be attended with the ruin of his family. Grants were therefore extended to the vassal and his sons, and they were then, and not till then, properly stiled *feuda*, yet still on the death of the vassal and his sons, the fief reverted to the lord. The succession was then extended (2) by law to grandsons, and afterwards by practice to descendants in infinitum. The distinction between *dominum direclum* and *dominum utile*, was then invented. This deduction, taken from the histories of foreign fiefs, is not so easily traced in Britain. In the Saxon times, earlier than in any other state in Europe, it is certain the book-land went to the heirs of the crown vassals ; but when it began to do so, we cannot discover. — During the foregoing period the inheritance was (3) equally divided among all the sons, but this law of nature, and of the world, gave way to the incompatibility of the feudal services being performed by many, and the succession was restrained to one son to be chosen by the grantor. This choice was necessary to prevent the danger of the fief's falling to one who might be incapable of doing the duties. A beautiful instance of this is to be seen still in the law of England. When a peerage devolves to heirs female, the king bestows on any of the daughters he pleases. But in ages of security it became natural and accustomary to give the fief to that son who first presented himself in the train of ideas, and the right of Primogeniture was then established. This progress may be traced in Britain. By a law of Edward the confessor, all the children appear to have succeeded equally. At a lower period in the Saxon times it appears by many charters that the succession was destinated to one son only, to be nominated by the grantee. The feudal system having been compleated by the conqueror, the right of primogeniture was doubtless established by that prince. Yet by a law of H. 1., if there was more than one fief, the eldest son succeeded only to *primum patris feudum*. But in the reign of H. 2. this right of primogeniture was become so strong, that a man could not even disappoint it by an alienation. Hitherto we have been speaking of military, not of soccage fiefs. In the former there was a necessity for one certain vassal to perform the services : in the latter there was no such necessity. Therefore in the reign of H. 2. these descended in capita, but the distinction of a soldier and a soccoman wearing away, the imagination of superiors that the rent would be more readily levied from one, the unwillingness of soccage vassals to have their succession split, these imperceptible causes more powerful than any public law, introduced the right of primogeniture into soccage holdings, before the time in which Fleta wrote. The progress of this right in public successions was the same as in private. Thus in the two first races of French monarchs, and early in the Saxon times, the kingdom was divided among all the sons. Even in later ages it was usual for kings to aid the principle of primogeniture, by having the ceremony of coronation performed on their eldest sons in their lives. — It was long after before the right of representation was established. The notions of nearness of blood, and the little attention paid to the rights of infants while the uncle was alive, and powerful, were obstacles to this right. There is scarce an instance in Europe, till the 13 th century, in publick successions, in which where a second son was of age, and the grandson by the eldest son a minor, the son did not take to the exclusion of the infant. On the death of Edmund I, his brother Edrid succeeded to the prejudice of Edwy his son, then a minor; and on the death of Edrid again, Edwy succeeded to the exclusion of Edrid's sons, infants, and tho' this was introduced first where the grandson was an infant, yet it was afterwards extended to the cases where he was of full age. Thus by a solemn judgment of all the peers of France, Maud succeeded in the county of Artois to her brother Robert II, to the exclusion of Robert III, his grandson by his eldest son, tho' of full age, and asserting his right. The right of representation was obstructed by a notion borrowed from the Roman law, that a son foris familitated had scarce any right to expect any thing further from his father. Hence in the publick successions of England, on the death of William the conqueror, William Rufus succeeded, not Robert the eldest, who was already provided with the duchy of Normandy. On the death of Henry the first, Stephen succeeded in preference to his elder brother Theobald, already earl of Blois. On the death of Richard I. John succeeded to the exclusion of his elder brother, Arthur, duke of Brittany. Indeed the right of representation being farther advanced in France than in England, most of the French lords took sides with Arthur. The rules in private successions were the same. It is laid down in Glanv. that when a son died, who was already provided, his son should succeed to that provision in preference to his uncles, and to no more; but if the father had not been provided, by his father, the grandson had the benefit of the duel against the claim of the uncle, instead of being absolutely excluded. But when Fleta was wrote, the right of representation in this competition was the law of the land. The decision mentioned on the succession to the county of Artois, was the last in public successions, determined on the old principle of nearness of blood. Richard II afterwards succeeded without dispute to his grandfather Edward III, to the exclusion of his uncles who were men of great abilities. It is no objection that in the earlier ages of Europe, crowns were generally given by election, for if the rules of that election were established and generally followed, they were properly rules of succession; it was only left to the people as judges. *Dalr. H. F. P. ch. 5. sect. 1.*

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(1) *Lib. feud., tit.* I. par. 1. Note of K.
(2) *Lib. feud.* tit. I, p. 2. Note of K.
(3) *Lib. feud.* I, tit., VIII. Note of K.

578. SUCCESSION IN THE COLLATERAL LINE. Formerly none could succeed in the fief, except those who were specified in the original grant. Collaterals are observed in the earliest fiefs to have succeeded some times : but this was only *in feudo paterno*, in which the successor took as descendant of the original vassal, and as nominated in the original grant, not at all as collateral to the last vassal. Collateral succession first (1) took place in brothers only, afterwards it was extended to the father's brother, and in process of time to the collateral line, even to the seventh degree. It had become indifferent to the superior who was his vassal, and vassals having grown rich, and paying money for the grant insisted on the succession of the collateral line. In collateral succession the right of Representation would be more slowly introduced, than in the descending line. In the original law of nature, representation must be unknown : those who are nearest in blood to a man, will be concieved to be nearest connected with him. Afterwards it is observed to be a hardship that children brought up suitably to the rank of their father, should by his untimely death be reduced to beggary. These considerations would bring in the right of representation in the descending line; but they do not occur in the collateral line, where a nephew is not brought up with a prospect of succeeding to his uncle's estate. Representation in the collateral line would rather come in by analogy of the other, than by principles of it's own. It is not easy to trace it's steps in private successions. In publick successions it is plain that representation in collateral succession was originally unknown. In the time of Edward I, when it was tolerably well established in the descending line throughout Europe, the question occurred between Bruce and Baliol whether the descendant of the elder sister, more remote by one degree, or the descendant of the second sister one degree nearer to the common stock, should succeed? The commissioners answered in favor of the representation, but representation in the collateral line not being then established in Scotland, the Scotch writers of those days pronounce positively that the judgment was wrong: the English writers on the other hand as positively pronounce it right; the same representation among them having begun to take place. Yet a century after, doubts on the same point gave rise to the disputes between the houses of York and Lancaster. The competitors were the duke of Lancaster, grandson of E. III. by his fourth son; and the earl of March, great grandson to the same prince by his third son. In France on the death of H. 3. the league set up the cardinal of Bourbon, one step nearer, but of a younger branch, in opposition to H. 4, who was of the elder branch, but more remote by one step. No dispute in publick successions has arisen in Europe since, on this point; and as the notions of representation in the collateral line in private successions have been since rivetted in the minds of mankind, it will probably never be disputed again. History and law convict us of error in branding as rebels those who died in support of these different rights, at times when they were not accurately settled. *Dalr. H. F. P. c. 5. sect. 2.*

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(1) *Lib. feud.* I., tit. 1. p. 4. *Note of Jefferson.*

579. ASCENDING LINE. It will readily occur, that the ascending line would be admitted to succession with greater difficulty than the collateral. A man, sufficiently obliged by getting a fief to himself would not think of asking it for his ascendants, who would probably not survive him, and at last would be but superannuated and useless vassals to the superior. Thus it came to be a rule in fiefs that they always descend, but never ascend ; a rule which prevails so far that the succession passing by the father will go to the uncle ; from whom indeed it may return to the father, as heir to his brother, not to his son. With respect to the half blood this distinction was made ; if a person was in by purchase the half blood was totally excluded : if by descent, it was admitted ; because tho' only of the half blood to the last poss'r, it was of the whole to the first acquirer, from whom he could deduce his pedigree : but in a long course of ages, this became impossible, and a rule was therefore established that the person last actually seised should be the root of descent ; by which the half blood was excluded. Women at first were not admitted to the succession of a fief. Besides the barbarity of the feudal times, which placed all merit in courage and bodily strength, the services were such in their nature that they could not be performed by women. Hence the Salick law excluded them altogether; and so did the books of the fiefs, if they were not expressly mentioned in the original grants ; but when the manners of men were softened, and the military were converted into soccage or burgage fiefs, which women might have performed, their rights came to be attended to, and regarded. In England, unless excluded by the patent, they were admitted to a peerage. With respect to other inheritances, the remains of their former exclusion are still to be seen, even in their admission in the descending and collateral line, they are not admitted till the whole male order, in the same degree has failed : and so subversive of all feudal notions, has their admission been considered that the common feudal principle of primogeniture has not been applied to it, but the succession according to the law of nature is divided among them all. In the ascending line, when a son is in by purchase, the maternal relations shall never succeed as long as there [is] one paternal left. *Dalr. H. F. P. c. 5. sect. 3.*

580. HISTORY OF THE FORMS OF CONVEIANCES. Voluntary conveiances. The notion of property being founded originally on the connection of the proprietor with the subject, and his affection for it, it is easily conceived among a rude people, how it can be transferred to another till there is evidence that that connection has ceased, as well as that affection. The *emissio verborum* is presumptive evidence of this, but a more corporeal medium of dissolving it is still requisite, such is delivery. Moveables were with facility transferred *de manu in manum.* Immoveables were formerly transferred in England by placing the purchaser in or upon the subject itself. To fix it in remembrance many witnesses were called, many ceremonies used, and magistrates resorted to. Afterwards the trouble, and sometines the impossibility of delivering actual poss'ñ introduced symbolical possñ ; and land is now transferred in England by delivery of a bough and a turf. When writing comes more into fashion many set forms of ceremonies give way to set forms of writing. These set forms, whether of ceremonies or of writing, must prevail more in the feudal, than in any other law ; because in other laws the connection between the grantor and grantee ceases with the completion of the grant ; but in the feudal law the relations of superior and vassal remain. By the interposition of homage, grants were originally made with much state ; and to make the impression stronger possñ was delivered by the superior himself, which was called *investitura propria*, in presence of the *pares curiae*, and on the land itself, tho' without writing, and this was used till 29. Car. 2. c. 3., which allowed parol conveiance to be only at will. Vassals to have more lasting evidence, prevailed on their superiors to give in writing what was called a *breve testatum* declaring the tenure of the investiture This was neither dated nor signed by witnesses, and is the origin of our present charters. When writings came more fully into use, these declarations contained more clauses than originally they had contained words, and were clogged with qualifications, conditions, and covenants, as extensive as the powers, and various as the interests of mankind. Men growing less fond of feudal pageantry, homage and fealty were dispensed with, and superiors, instead of delivering possñ themselves, gave orders to their attorneys or bailiffs to do it ; and any witnesses signing, tho' not *pares curiae* were sufficient : and thus the improper investitures were established ; and in England were reduced into writing, and executed by feoffment and livery. As long as possñ was given before the *pares curiae*, there was a necessity for the livery of each particular manor, because those who were *pares curiae* to the investiture of one manor were not *pares curiae* to the investiture of another. But symbolical delivery and the dispensing with the *pares curiae* as witnesses, enabled the feoffor to give seisin in one will in name of all his lands in that county. Such were the forms of original grants : but in a derivative grant, as antiently the vassal could not of himself alienate, there was need either of a confirmation by the superior, or of a surrender to, and new grant from him. But afterwards the stat. *Quia empt. ter.* taking away the distinction between an original and derivative grant by making the donee hold of the chief lord, removed the necessity of confirmation by, or surrender to, him. *Dalr. H. F. T. c. 6. sect. 1.*

581. Involuntary conveiance. This is either by forfeiture or attachments for debt. The latter has been spoken of before (1). With respect to the former, as only the king or lord was interest in the transfer by forfeiture, so antiently in the law of England, the transfer was made good by the immediate seisure of the subject forfeited. This was agreeable to the genius of the feudal system; which went on the general plan, that wherever there was a deficiency of a vassal, the fief should revert to the lord; which rule had originally taken place in escheats, when the property and superiority were reunited. The severity of this rule was first checked in the cases of nonentry and escheat: for in England, the lord lost the power of taking possñ at all on the death of a vassal: and by a stat. of Ed. 1, the king was restrained from taking possñ either on the death or escheat of a vassal till an office was found. This paved the way for restraining the king's power of seisure on forfeiture, which was equally dangerous with that on escheats. Between the suggestions of the necessity of an office on the one hand, and the king's antient right on the other, the law of England was unfixed for some time. A stat. *33 H. 8. c. 20.* established the king's right of seising before office in attainders of treason; but the law in other cases is left on it's ancient footing. *Dalr. H. F. P. c. 6. sect. 2.*

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(1) Ante 574. *Note of Jefferson.*

582. MAKING TITLE BY DESCENT. The forms of taking an estate by succession, proceeded originally on the same plan of connection between superior and vassal on which the other forms of conveiances proceeded. In the antient constitution of a feudal grant, the lord gave the fief to the vassal on condition of performing services. When by the death of the grantee therefore, these services could not be performed, the land returned to the grantor. Afterwards when it was held that fiefs descended, the heir was obliged to apply for a renewal of the grant, which the lord however could not refuse. In the reign of Henry 2, this vigorous dependence had so far ceased that the heir on paying the *simplex sasina*, might take up the fief without applying to the lord, and in the end, when a very extensive commerce causes a continual fluctuation of landproperty, and the dispatch of business, so necessary in extensive dealings, will not admit of slow forms, property becomes transferable by any act which shows the intent of the grantor. Thus, tho' conveiances by infeoffment, and by fine were originally used, yet as early as the time of Lyttleton; land was transmitted by attornment, if there was a tenant or by lease and release if there was none. The first supplied the place of livery which could not be given, the second gave livery by giving possession, but *27 H. 8. c. 16*, dispensed with all form when it established the conveiance by bargain and sale in which all notion of a superior and of delivery is lost ; and the moment the deed is inrolled, the estate to almost all the effects whatever is vested ab initio ; nor can there be any dispute between competitor purchasers, except from the dates of their respective enrollments. So in the attam̃'t by law, the judgment by law only appears. The transmission of succession *ab intestato* has had the same fate ; the heir instead of making application to the superior, takes the estate by any ouvert act which, shews his intention to do so. *Dalr. H. F. P. c. 6. sect. 3.*

583. Records. The English have always been deficient in the use of registers. Conveiances by feoffment and livery, lease and release, bargain and sale, needed not to be recorded, nor even reduced to writing. The *27 H. 8. c. 16* ordained that bargains and sales should be inrolled within six months from their date. The *29. C. 2. c. 3*, obliged all conveyances for more than three years to be in writing. In the securities for debt they have been more provident ; for a recognisance or statute must be inrolled. An extent also must appear on record. But yet purchasers and creditors were on an uncertain footing, the other conveiances being good without record. To remedy this, fines were introduced. They were originally a friendly composition entered on record. By the stat. of fines *18. E. 1.* they were made to conclude all persons who did not claim within a year iand day. This remedied the incertainty of purchasers n some measure, but the stat. *de donis* lessened this remedy by declaring fines levied on entailed lands to be void. But there came the *4. H. 7. c. 24.* and *32. H. 8. c. 36.* enacting that they should bar the issue in tail, introducing proclamations and extending the time of claiming to five years. Still they did not bar rem̃'rmen and reversioners. A common recovery was then invented; which was a feigned suit and judgm̃'t recorded, in which the estate was evicted from the ten. in tail and relief given him agt. an imaginary warrantee worth nothing. This relief was supposed to descend in tail as the lands recovered, and was therefore deemed a recompence to those in rem̃r and revñ, and tho' it was imaginary they were not permitted to impeach it. But fines and recoveries conferred no security on creditors : and even purchasers are liable to two dangers, to wit. as to rents and m'ges : there being no register of these. Of late years they have ordained registers for all deeds and conveiances to be kept in several parts of England, and probably they will be extended over the whole. *Dalr. H. F. P. c. 6. sect. 4.*

584. History of jurisdictions. Among the antient Germans, men had power of life and death in their own families. — The princes who gave beginning to the feudal system in Great Britain, were at once generals and judges. — When the conquests were settled, their officers shared with them in a regular jurisdiction. — In the end the power of judging taken from those who formerly enjoyed it, is at present entrusted entirely to judges. The gradation from the third to the last step of this progress, constitutes the history of feudal jurisdictions in Britain, and is now to be traced. In all the conquests made by the feudal nations, a power of judging the inhabitants was always given to the possessors of lands, as being more immediately able to observe, seize, and punish delinquents. The lords of charter land judged their people in their Hallmotes ; the judges of the king his people in Revemotes, if in a county, and Burghmotes, if in a borough. These courts of the king and of the lords had separate limits ; nor could the former intermeddle with the latter unless the lord refused justice, or was too poor to have a court of his own, or unless the jurisdictions of different lords clashed. From either the hallmote or revemote an appeal laid to the king who sat in his great council, and took cognisance of it. Upon the Norman conquest all the allodial were converted into feudal lands ; and consequently the lords acquired a jurisdiction in these new feuds also. Yet the sheriff's court was still retained, it was made co-ordinate with the lords' courts in most cases, and superior to them in many. William the conqueror established a constant court in the hall of his palace, called *Aula regis*, for all matters, of crimes, and of finances. This court consisted of the chief officers of the king's palace, among whom the chief justiciary presided ; and it received appeals from all inferior courts. The territorial jurisdictions could not be the favorites of kings. H. 2 therefore divided the kingdom into six circuits, and sent judges itinerant thro' the land. He also divided the *aula regis* into two new courts called the king's bench, and Common pleas, who took cognisance of causes not only by appeal, but in the first instance : and E. 1, sat sometimes himself in the court of king's bench, to give it state. He also ascertained the boundaries of the exchequer, which had been raised out of the *aula regis*. He invented a new jurisdiction, of justices of peace, which being a wheel within a wheel, distracted the power of the lords on their estates. E. 2. took the nomination of all sheriffs into his own hands. E. 3. extended the power of the court of chancery, which had it's foundation likewise in the *aula regis*. On the dissolution of the *aula regis*, and the formation of the four great courts on it's ruins, the house of peers came to be the supreme court of appeal. The king's great council among the Saxons had consisted chiefly of the great Thanes of the kingdom : and as the *aula regis* among the Normans had been made up of the officers of the palace, it likewise had consisted chiefly of the great lords of the kingdom who were invested with the great offices : and when the first of these courts of dernier resort was sunk, and the other divided into other courts, the great lords of the realm being assembled by themselves, and tho' a part of the parliament, yet retaining their antient distinction fell naturally, according to the analogy of ancient practice, to be considered as the great court of appeal to the nation. By these means the business of the inferior courts decayed, the feudal jurisdictions sank, and at present a landlord or a sheriff cannot hold plea where the debt or damage is 40 s, the latter being more properly an officer than a judge. Yet the remains of the feudal jurisdictions appeared with vigor long in the courts palatine. Many of these have now been totally abolished, and the powers and privileges of the others much abridged *Dalr. H. F. P. c. 7. sect. 1.*

585. According to a juridical account and legal signification TIMÉ WITHIN MEMORY is the time of limitation in a writ of right, which the stat. of *Westm. 1. c. 36.* has settled *ex prima coronatione regis Richardi primi*, which was in 1189. Therefore statutes made before that time are not now pleadable as acts of parliament, because what is before time of memory is supposed without a beginning, but they obtain their strength by meer immemorial usage or custom. Hale's *Hist. of the Com. Law. c. l. p. 2.* (1).

586. A general Act of Parliament made within time of memory, loses not it's being so, because not extant of record, because a court is to take notice of it without pleading it ; and it shall never be put to be tried by the record upon an issue of Nultiel record, but it shall be tried by the court who may inform themselves by antient copies, transcripts, books, pleadings, and memorials, common received opinion, the approbation of the judges learned in the law. But it is otherwise of private acts of parl. which may be tried by the record of parl. on the issue of Nul tiel record, unless they are produced exemplified, as in Prince's case. 8. Co., in which case the averment of nultiel record was refused. Hale's. *H. C. L. c. l. p. 15.*

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(1) Bernard HALE, *History of the Common Law*. London, 1716.

587. *Rules of Descent.* 1. In descents the law prefers the worthiest of blood. Therefore the son excludes the daughter, and the descendants of elder males are preferred to the descendants of younger males. 2. The next of blood is preferred before the more remote, tho' equally or more worthy. Thus a son is nearer than a brother; a brother than an uncle; the uncle than the great uncle.

3. All the descendants from such a person as might have been heir to another hold the same right by representation as that common root from whence they are derived.

4. The eldest son etc. excludes the younger; and the males in equal degree do not all inherit; but females do.

5. The last actual seisin in any ancestor, makes him as it were the root of the descent.

6. Whosoever derives a title to any land must be of the blood of him who first purchased it, but note it is not necessary he should be heir to the first purchaser. For instance, the father purchases lands which descend to the son who dies without issue leaving his father's mother's brother, and his paternal grandfather's mother's brother. The lands shall descend to the father's mother's brother who is heir to the son; and yet were the son out of the way, his paternal grandfather's mother's brother would be heir to the father, the first purchaser.

7. In all successions, whether descending, transversal, or ascending, the line that is first derived from a male root has always the preference. In the two first this is evident enough; but in ascending succession it must be further explained. Therefore, first the son purchases and dies without issue; those of the male line ascending in infinitum shall be preferred in descent according to their proximity of the degree to the son: viz. the father's brothers and sisters, and their descendants, before

the grandfather's brothers, etc. Secondly, the line of the part of the mother shall never inherit as long as there are any, tho' never so remote, of the line of the part of the father. Thirdly, the male line of the part of the father ascending, shall in aeternum exclude the female line of the part of the father ascending: therefore in inheriting the son's lands, the father's grandfather's sister shall be preferred to the father's mother's brother. Fourthly, as in the male line ascending, the more near is preferred before the more remote, so is it in the female, provided it be of the blood of the father. Thus the father's mother's sister inherits the son's lands before the father's grandmother's brother. Fifthly, if the son purchases lands and dies without issue, and it descends to the heir of the part of the father, and then the line of the father, after being actually seised, fails, it shall never return to the line of the mother; tho' they might have inherited from the son in the first instance. Sixthly, if lands descend to the line of the mother, the heirs of the mother of the part of her father's side shall be preferred before her heirs of the part of her mother's side. Most of these rules are taken from Pl. Com. 444. Clare v. Brook. Hale's *H. C. L. 235.*

588. Words, actionable. *Cro. El. 214* (1).

589. In tail, lands devised in tail by husband. *Cro. El. 2.*

590. Case 17 E. 2. Error 90 denied to be law. *Cro. E. 2.*

591. Re-entry for non paiment. *Cro. El. 15.*

592. Covenants, perpetual. *Cro. El. 3.*

593. Alien (if baron and feme go beyond sea without licence, or stay there after the time limited by the licence, and have issue, it is alien and not heritable. Hyde v. Hill. *Cro. El. 3.*

594. Third person, award concerning. *Cro. El. 4.*

595. Sheriff, debt against. *Cro. El. 5.*

596. Words actionable. *Cro. El. 6.*

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(1) Croke's *English King's Bench Reports, tempore Elizabeth.*

597. Exception. *Cro. El. 6.*
598. Bond, performance of condition of a. *Cro. El. 7.*
599. Lease, delivery of a deed of. *Cro. El. 7.*
600. Assurance. *Cro. El. 9.*
601. Lands, devise of, in fee. *Cro. El. 9.*
602. Undersheriff, sent by sheriff. *Cr. El. 9.*
603. Words, actionable. *Cr. El. 31.*
604. Arrest, by discharged sheriff. *Cr. El. 12.*
605. Ejectment. *Cr. El. 13.*
606. Distress, for rent. *Cro. El. 13.*
607. Date, money to be received at or before such a day. *Cro. El. 14.*
608. Date. *Cro. El. 14.*
609. Implication, doctrine of. *Cro. El. 15.*
610. *Paululum*, meaning of. *Cro. El. 19.*
611. Usury. *Cro. El. 20.*
612. Re-entry for non paiment of rent. *Cro. El. 22.*
613. Lease, for life. *Cro. El. 25.*
614. Words, actionable. *Cro. El. 26.*
615. Usury. *Cro. El. 27.*
616. Descent, line of. *Cro. El. 28.*
617. Estoppel. *Cro. El. 36.*
618. Consideration. *Cro. El. 94.*
619. Administrator during minority. *Cro. El. 43.*
620. Breach of covenant. *Cro. El. 43.*
621. Deceit, for selling goods as his own. *Cro. El. 44.*
622. Non-paiment, plea of. *Cro. El. 46.*
623. Re-entry. *Cro. El. 48.*
624. Pirates, help to. *Cro. El. 52.*
625. Devise for life. *Cro. El. 52.*
626. Prisoner, escape of. *Cro. El. 53. and 123.*
627. Apprentice, assaulting an. *Cro. El. 55.*
628. Tenure for life. *Cro. El. 56.*
629. Lease for life. *Cro. El. 57.*
630. Devise for life. *Cro. El. 61.*
631. Promise of marriage. *Cro. El. 61, 63, 67, 74.*
632. Words, actionable. *Cro. El. 62.*
633. Deputy of a sheriff. *Cro. El. 67.*

634. Bond. *Cro. El. 68.*

635. Felony, appeal of. *Cro. El. 69.*

536. Debt. *Cro. El. 78.*

637. Words, actionable. *Cro. El. 78.*

638. *32. H. 8. Bro.* Verdit. *90* denied to be law. *Cro. El. 79 and 147.*

639. Promise of marriage. *Cro. El. 79.*

640. Devise to four to sell ; one refuses to meddle. *Cro. El. 80.*

641. Assault and battery. *Cro. El. 107.*

642. Debt, time and place in request to pay. *Cro. El. 85.*

643. Debt, not properly a. *Cro. El. 91.*

644. Words, breach of good behavior. *Cr. El. 86.*

645. Lease for life. *Cro. El. 89, 107.*

646. Dice, case for playing with false. *Cro. El. 90.*

647. Property, field common. *Cro. El. 90.*

648. Debt, promise to pay a. *Cro. El. 91.*

649. Executor, renunciation of an. *Cro. El. 92.*

650. Words, actionable. *Cro. El. 99.*

651. Tenants in common. *Cro. El. 95.*

656. (1) Trespass by husband and wife. *Cro. El. 96.*

657. Action, no action for less than *40* sh. in stat. of Gloucester. *Cro. El. 96.*

658. Estate in tail. *Cro. El. 96.*

659. Assurance. *Cro. El. 97.*

660. Trover and conversion. *Cro. El. 97.*

661. Will, writing of a. *Cro. El. 100.*

662. Debt, paiment of. *Cro. El. 101.*

663. Executor. *Cro. El. 102.*

664. Misnomer. *Cro. El. 257.*

665. Misnomer in a will. *Cro. El. 106.*

666. Water rights. *Cro. El. 112.*

667. Misnomer. *Cro. El. 113.*

668. Debt of a testator. *Cro. El. 120.*

669. Land, parcel of land adjoining. *Cro. El. 269.*

670. Debt against administrator. *Cro. El. 121.*

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(1) Intermediary articles omitted in mss.

671. Deed. *Cro. El. 122.*

672. Trover of a dog. *Cro. El. 125.*

673. Contract by infant. *Cro. El. 126.*

674. Descent, line of. *Cro. El. 128.*

675. Feme under age. *Cro. El. 129.*

676. Arrest on warrant, by justice of peace. *Cro. El 130.*

677. Debt against baron and feme. *Cro. El. 130.*

678. Tenure for life. *Cro. El. 131.*

679. Paiment, record of. *Cro. El. 233.*

680. Infant, money tendered to an. *Cro. El. 132.*

681. Words, actionable and not actionable. *Cro. El. 135, 394, 788, 609, 905.*

682. Levying by distress, plea of. *Cro. El. 140.*

683. Paiment at such day and place. *Cro. El. 142.*

684. Feoffment, good. *Cro. El. 142.*

685. Deed, good. *Cro. El. 143.*

686. Tenants in common. *Cro. El. 143.*

687. Devise on condition. *Cro. El. 146.*

688. Assumpsit. *Cro. El. 147.*

689. Considerations, frivolous and void, others good. *Cro. El. 149.*

690. Error after verdict. *Cro. El. 153.*

691. Debt on single obligation. *Cro. El. 157.*

692. Devise of lands. *Cro. El. 159.*

693. Extent. *2. Ca. Ch. 182. 1. Ver. 349.*

694. In the Lacedemonian constitution every man might lawfully take what by address he could make himself master of without force or violence. Kaim's *Natural religion. pa. 110* (1).

695. The laws of the Tanistry among the antient

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(1) The only passage in the correspondance where Kames' *Natural religion* is quoted is the following : « To these might be added Lord Kaims, one of the ablest of our advocates, who goes so far as to say in his *Principles of natural religion*, that a man owes no duty to which he is not urged by some impulsive feeling... Perhaps I may misquote him, it being fifty years since I read his book ». *To Thomas Law.* June 13, 1814. *M. E.* XIV, 144.

Irish, like Alexander's will, gave the inheritance to the strongest. Warner's *hist. of Ireland. 89* (1).

696. Pelloutier supposes Europe to have been inhabited by the Scythians, of whom there were two people differing radically in their manners, customs, laws, and languages, to wit, the Hyperboreans or Celts, and the Sarmatians. The Celts occupied all the Western parts, to wit, Spain, the Gauls, the British islands, part of Italy, and Germany, which then commencing from the Rhine Westward and Danube Southward, included Scandinavia, Poland, Prussia and Muscovy as far as the Palus Maeotis and the Tanais now the Don which empties into that lake. The Sarmatians inhabited the Eastern parts of Europe and part of Asia ; nearly the same countries they now occupy. He suspects the Medes were the same people with the Sarmatians, or that the one of them descended from the other, and that the Persians were the same people with the Celts. Pelloutier. *Hist. des Celtes. c. l. 2.* (2).

697. The antient authors cited by Pelloutier as proving Spain to have been occupied by the Celts, call the inhabitants Iberi, Gauls, Cimbri, and a multiplicity of other names, yet he sais « the antient authors were so well satisfied that the natural inhabitants of Spain were not different from the other Northern people that they do not hesitate to give them, with the name of Celts, that also of Gauls, and even of Cimbri », but it seems strange to conclude the antients were satisfied they were the same people because they called them by different names. He proposes however to prove them the same by the similitude of their customs. Pellout. *hist.* c. 4.

698. To prove Gaul inhabited by the Celts he cites the first words of Caesar « *Gallia est omnia divisa in*

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(1) Ferdinand Warner, *History of Ireland*, 1763.

(2) Simon Pelloutier, *Histoire des Celtes*, La Haye, 1740-1751. 2 vols in-12. Paris, 1771, 2 vols including l'*Histoire des Galates.*

partes tres ; quarum unam incolunt Belgæ ; aliam, Aquitani ; tertiam, qui ipsorum linguâ Celtæ, nostrâ Galli appellantur. Hi omnes linguâ, institutis, legibus inter se differunt». Which if anything, prove the Celts inhabited only one third part, and that the other two nations, the Aquitani and Belgici, were different in language and customs. However he sais it may be incontestably proved there was a mother tongue from which all these were derived. He cites also Strabo *lib. 4. p. 176. 177.* as saying that the Celts inhabit along the seashore of Marseilles and Narbonne and extend to the Alps ; and Diod. Sic. *lib. 5. p. 214.* that the Celts lived above Marseilles in the middle of the country above the Alps and Pyrenees, and that the people South of Celtica towards the ocean and Hyrcanian mount and the other nations from thence to Scythia are called Galates by which name the Romans sometimes mean to include the Celts also. He sais that Galates was the Greek name of the people whom the Latins called Galli. He cites from Pausan. Attic. c. 3. p. 10. these words « *ut Galli appellarentur non nisi vero obtinuit. Celtas enim cum ipsi se antiquitus, tum alii eos nominarunt.* » The only citations which seem to his purpose are these. « *Celto-Gallia in quatuor divisa est provincias, Aquitaniam, Lugdunensem, Belgicam, et Narbonensem.*» Ptolem. *lib. 2. c. 7.* «*Celtica quae nunc Gallia vocatur.* » Appian. *de bello Annib. 546.* From all which he concludes that Gaul was inhabited entirely by Celts. Pell. *hist. c. 5.*

699. His quotations to prove Germany inhabited by Celts are more conclusive. Herod. *lib. 2. c. 33. lib. 4. c. 49.* Arrian. *exped. Alex. p. 8.* say that all the people on the Danube from it's source to the Quadi and Marcomanni were Celts. Dio. *lib. 38. p. 31. lib. 53. p. 503. lib. 39. p. 114* speaks of some Celts whom they call Germans having crossed the Rhine to assist Ariovistus, and sais that the people on both sides the Rhine were called Celts till those on the Western side came to be distinguished by the name of Gauls. Strabo *lib. 4. p. 196. lib. 7. p. 290,* says that the two people on different sides of the Rhine, Germans and Gauls have a resemblance of temperament, manners, customs, and all other things, except that the Germans are fiercer, fairer, and taller. SCANDINAVIA, a part of the antient Germania superior was according to Tacitus *de mor. Germ. c.* 43-46. inhabited by tribes of Germans called Suiones, Sitones, and many others, who lived on the ocean as far as the frozen sea. Pomponius Mela. *lib. 3. c. 6*, sais that Scandinavia, which he and Pliny call an island was still occupied by the Teutons. These Pelloutier takes for granted were a Celtic people. The Aestyi mentioned in Tac. *Germ. c. 45.* inhabited the modern Prussia. Both they and the Gothini were Celts. From MUSCOVY, which was also a part of Germany came the OSTROGOTHS, the ALANS, and the HUNS who he sais were Celts. *Pellout. his. c. 6.*

700. BRITAIN, he proves was either peopled from Gaul, or Gaul from Britain. He cites from Hotoman. *Franco-Gall. c. p. 2. p. 21.* a law of Edw. I. king of England *Britones Armorici, cum venerint, in regno isto suscipi debent et protegi: sunt probi cives de corpore regni huius. exierunt enim quondam de sanguine Britonum regni huius.* » He shews too from Caes. *lib. 4. c. 20. lib. 6. c. 13.* that the Celtic religion was preserved in great purity in Britain while in Spain and Gaul it was altered by the superstition of the Phenicians, Greeks, and Romans; insomuch that those who wanted to study it went to Britain for that purpose. *Pell. hist. c. 7.*

701. He sais the people North and South of the Danube, from the Euxine to Cartuntum, were Celts. Strabo *lib. 7. p. 304*, sais that those people on the North of the Danube were by some of the antients called « *Getæ, qui versus Pontum et Orientem inclinant, Daci qui in diversum ad Germaniam et Istri fontes vergunt* », but in *lib. 4. p. 298. lib. 7. p. 303. 313*, he calls them indifferently by either name; and in *lib. 7. p. 305*, sais their language was the same. From this and Justin *L. 32. c. 3*, «*Daci quoque suboles Getarum sunt*» and Plin.

lib. 4. c. 2, « *Getæ Daci Romanis dicti* », he concluded they were the same people, Getæ being the Grecian, and Daci the Roman name. He cites also Dio. *lib. 67. p. 761. lib. 51. p. 470.* Which seem to prove it. From the countries antiently occupied by the Daci or Getae issued the Bastarnians, Visigoths, Gepidi, Vandals, Heruli and several other people who he sais were *undoubtedly* Celts. Jornandes Getii. *p. 628*, sais « *Gothica, quam Daciam appellavere majores, nunc Gepidia dicitur* » and he is of opinion that the Goths are the same people formerly called Getæ. Tho' he sais it is contested by some moderns, he cites, to prove it, Isidor. *Orig. lib. 9. c. 2. p. 104*, « *Gothos veteres magis Getas quam Gothos vocaverunt* », Orosius. *lib. l. c. 16. p. 48.* « *Getae qui nunc Gothi* », and Procop. *Gothic. lib. l. c. 24. p. 372.* « *Geticam gentem aiunt Gothos esse* » ; also Claudian *de bello Getico*, passim and Spartianus Caracalla *p. 731.* and Pertinax, *p. 743*, and he adds « quoi qu'il en soit, il paroit clairement par les noms des villes et des cantons Daces, que leur langue etoit l'ancien Celte ou Tudesque ».

On the South side [of] the Danube he tells us were a tribe of the Gauls. Some of whom passing into Asia, took the name of Tectosagi. Justin. *lib. 24. c. 4. lib. 32. c. 3.* Strabo. *lib. 4. p. 187.* There were also on the South of the Danube several other Celtic or Gallic people, so acknoleged by antient authors, the Scordisci, Bastarni, Boii, Taurisci, et Japides, whom he sais nobody denies to have been Celts or Gauls, for they were called by these names indifferently, and cites Strabo. *lib. 7. 296. 315.* He sais that Justin *lib. 24. c. 4.* et Liv. *epil. 63.* declare the Scordisci descended originally from the Gauls. (But Justin at the place cited sais not a word about them. Livy, indeed sais « *Scordiscos, gentem a Gallia oriundam* ».) They inhabited Illyria at the confluence of the Save with the Danube from the mountains of Thrace to those of Macedonia. The Bastarnians above mentioned living between the Celts and Sarmatians, adopted customs from both, so as sometimes to be called Sarmatians, sometimes Scythians, sometimes Getae, and sometimes Germans. They lived beyond the Danube towards Poland. The Boii lived between the Danube and the Drave : and some of them North of the Danube in the Hercynian forest according to Tacit. *Germ. c. 28, 42*, and Strabo ex Posidonio *lib. 17*, p. *290 et 293.* It is said Livy *lib. 5, c. 34, et 5*, Tac. *Germ. c. 28*, that they came from the Gauls, and Strabo *lib. 5. 213*, from Italy. The Taurisci or Ligurisci were a Celtic people living on the Danube next to the Scordisci. They afterwards removed to Noricia. Plin. *lib. 3. c. 20*, Strabo. *lib. 4, p. 206, 208.* The Japydi were Celts living on the Adriatic between the Istrians and the Liburnians, Strabo. *lib. 4, 207. lib. 7. 314*, Plin. *H. N. lib. 3. c. 4.* The Scordisci, Taurisci, and all the other nations between the Save, the Drave and the Danube were called Pannonians, who according to Zosimus *lib. 1. c. 2*, were Celts. Pell. *hist.* c. *8*.

702. Greece was in it's earliest state inhabited by a people called Pelasgians, who were, according to Pelloutier, a Scythian people. The Egyptians and Phenicians, being engaged in commerce, settled colonies, on the coasts of the Mediterranean as far as the pillars of Hercules. About two generations, as it is supposed, before the Trojan war, they sent colonies into Greece, who gaining strength drove out part of the antient inhabitants and reduced the rest to subjection, so that the Grecians known to history were a mixture of Egyptians, Phenicians, and Pelasgians or Scythians. Dyon. Hal. *lib. 1. p. 20*, Strabo. *lib. 7. 321. lib. 9. 401. lib. 10. 447*, Pell. *hist. L. 1. c. 9.* (*neither the Egyptians nor Phenicians ever pretended any right of dominion over the Greeks, their colonists. — By the bye, this emigration must have been very numerous, or much earlier than above supposed, for two generations would not have sufficed to enable them to raise and to spare from the defence of their country at home such an armament as was sent to the Trojan war.*)

703. The fable of the Titans or giants waging war on the gods and being defeated by Jupiter's thunder is well known. Apollon. Argonaut. *Schol. lib. 2. p. 289*, and Solin. *c. 14*, say this defeat was in Thrace, Justin, *lib. 44, c. 4*, that it was in Spain, Diod. Sic. *lib. 4. 159. lib. 5. 226, 234*, Strabo *lib. 5. 243. 245. 281*, that it was in Italy near mount Vesuvius, Pomp. Mela. *lib. 2. c. 5*, Solin. *c. 8*, that it was in Gaul between Marseilles and the mouth of the Rhone. This proves sais Pelloutier, that the new religion introduced by the Egyptian and Phenician colonies met with the same opposition *wherever there were Celts.* and so concludes there were Celts *wherever there was opposition*, that is in all these countries. *Pell. hist. L. 1. c. 9.*

704. From Teuf (the Celtic word for god) he derives Titanes, the name of the antient inhabitants of Greece, θεος, and Zeus. To prove the Greeks of Celtic origin he produces instances of resemblance between their language and that of the Germans which he supposes derived from the Celts. The following are some of them. θυγατηρ Gr. *Tochter*, Germ. *daughter*. Eng. — γενυς, *kinn*, *chin* — γονυ, *knie*, the *knee* — ητος, *hertz*, the *heart* — ερα, *erde*, the *earth*. — οχλος, *volox*, the *people*. (but οχλος, signifies a crowd.) — εργον, *ouerx*, *work* — νυξ, *nacht*, *night* — ἡδυς, *süss*, *sweet* — σταω, *stehen*, *stand* — στεγω, *dexen*, to *cover* — σιζω, *stechen*, to *stick* — ἵζω, *sitzen*, to *sit*. These are taken from about 50 instances he produces. *Pell. ib.*

705. He then proceeds to the antient inhabitants of Italy. All the people who lived in the upper part of Italy from the Alps to the Appenine were Gauls. Those of them who lived on the Mediterranean were called Ligurians. There were also Ligurians in Spain, the Gauls, Germany, Thrace and Asia minor. Strabo lib. 2. 128, sais they were a different nation from the Gauls, but had the same manner of living. The Vocontii of Dauphiny, Salluvii of Marseilles and Euganaei were Ligurians, and cites proofs. The Euganaei resided in Italy about the Trent, the Po, and the Tessino, of whom the STONI, VAGIENNI and TAURINI were tribes. All these Ligurians boasted of their descent from the AMBRONS whom Marius defeated *Plut. in Mario*, and were known to be Celts from their hair, manners, and language. — Cites authorities. Those who lived on the Adriatic from the Alps to the Appennine were the BOII and INSUBRES. His proof that these were Celts is that the Insubres named the place where they held their assemblies MEY-LAND, or Midland, which he sais is a Teutonic word, but all these were people of a later date. He therefore remounts to the original and deduces a history of Italy, shewing that 1. The SICULES, seated there. The UMBRI are also mentioned as among the earliest inhabitants. 2. The ABORIGINES. 3. The PELASGI, who came over under the conduct of Italus from Greece, seventeen generations before the siege of Troy, and others of them from Thessaly. Another colony of them came from Arcadia with Evander, and built Pallantium 60 years before the Trojan war. Hercules brought over another consisting of Peloponnesians and of some Trojan prisoners. 4. Afterwards came the TUSCI from Lydia under Tyrrhenus, of whom the Rhetii who settled on the Alps were a colony. 5. Lastly came the TROJANS under Aeneas, and others of them under Antenor. The latter settled at Venice. The 5th and 2nd people he thinks were Celts ; but produces no authority except as to the Umbri of whom Solin. *c. 8*, sais « Gallorum veterum propaginem Umbros esse Marcus Antonius asseverat ». The Pelasgi he thinks came much later, and that they were Greeks, not Pelasgi, and this without, and indeed in contradiction to all authority. The Tuscans he conjectures were Celts, on very slight grounds, and the story of the Trojans he takes to be altogether fable. He then observes that the Romans were a mixture of the Celtic tribes, to wit, the Umbri, Tusci, and Sabines, (who were descended from the Umbri) and of the Grecian colonists. This he thinks proved by the mixture of customs, some Celtic, some Greek which prevailed among the Romans, by the mixt form of their religion, and also by their language which he derives from the Celtic, *Pell. hist. L. 1. c. 10.* (*this shews the ardor of the author to establish his system, for it is not possible to admit two languages so dissimilar as the Latin and Greek to be immediately derived from a common root, and that on the sole authority of 40 or 50 analogous words*).

706. He cites authorities proving that Sicily was peopled either from Italy or from Spain, of both which countries he had already spoken. *Pell. hist. c. 11.*

707. Les anciens auteurs ont prétendu que les noms des peuples Celtes viennent originairement de quelque prince célèbre, qui ayant relevé la gloire de sa nation, a mérité par là, qu'elle adoptât son nom pour le rendre immortel. On dit par exemple que les Scythes ont reçu ce nom du roi Scythus, les Celtes de Celtus, les Gaulois de Gallus, les Belges de Belgius, et ainsi des autres. J'ose bien assurer, que ces étymologies sont toutes fausses. Les rois des Celtes étoient les chefs des partis qui s'élevoient au milieu d'un état. Il y avoit souvent dans un peuple autant de rois, que de différentes factions. Le peuple, jaloux de la souveraineté les élevoit et les déposoit selon son bon plaisir, et ne les considéroit jamais assez pour prendre le nom d'un prince qui étoit rarement reconnu par tous ses compatriotes. *Pell. hist. c. 14.*

708. Les peuples Celtes, qui avoient une demeure fixe, étoient ordinairement partagés, en Cantons, en Peuples, et en Nations. Le Canton, Pagus, étoit un district occupé par un certain nombre de familles, qui avoient leur juge particulier, et un Mallus, c'est-à-dire un tribunal ou la justice s'administroit pour tout le canton. Un Peuple, Civitas, Populus, étoit un état indépendant, souverain, formé de l'union de plusieurs cantons. Le peuple des Helvétiens, par exemple, étoit composés (*sic*) de quatre cantons, *Caesar. 1. 12.* Ces peuples tenoient au commencement de chaque printemps une assemblée générale, où tout homme libre et capable de porter les armes étoit obligé de se rendre, et où l'on décidoit, à la pluralité des voix, toutes les affaires qui pouvoient intéresser le bien de l'état. Ces états souverains étoient en très-grand nombre dans toute la Celtique, comme ils le sont encore aujourd'hui en Allemagne. Du tems de Jules Cesar, on comptoit dans les Gaules trois à quatre cents peuples différents, dont la plupart devoient être selon les apparences très peu considérables. Plutarch *in Caesare*. Appian *de bello civili* L. 2. Enfin les Peuples, qui entretenoient ensemble quelque liaison, et qui se réunissoient en tems de guerre pour mieux résister à un ennemi commun, formoient ce que j'appelle une Nation. C'est dans ce sens que Jules César dit que les Gaulois étoient divisés de son tems en trois parties, dont la première étoit occupée par les Belges ; la seconde, par les Aquitains ; et la troisième par les Celtes. *id. ib.*

709. In this chapter (14 th) he undertakes to prove the antient names of the inhabitants of Europe to have been of Celtic derivation ; yet the greater part of them are evidently Teutonic. *Pell. hist. c. 14.*

710. There were Teutons on the Baltic where they occupied vast countries. Scandinavia entirely was inhabited by Teutons. Pomp. Mela. L. 3. c. 6. *Pell. hist. c. 14.*

711. In chapter 15 he proposes to prove the similitude of the languages of the several people whom he supposes to have been Celtic. The language of the inhabitants of Britain was little different from that of Gaul, « *sermo haud multum diversus* » Tac. *Agric.* c. 2. The same author in his *Germ. c. 45*, sais the *Aestyi* who inhabited the modern Prussia, tho' resembling the other Suevi in their customs, yet spoke a language which approached nearer to that of Britain. The Gothini who by Tacit. *Germ. c. 43.* lived on the frontiers of Poland and Silesia « *a tergo Quadorum et Marcomannorum* » spoke the language of the Gauls. Here then, sais Pelloutier, are people at the extremities of Germany who have the same language with the Gauls and Britons. The

Scordisci were the principal of those Gauls who (1) removed from Pannonia in Asia Minor 474, and their posterity were the poeple to whom St. Paul addressed his epistle to the Galatians. Now St. Jerom sais the language of the Galatians was nearly that of the Trevirii or inhabitants of Treves, which in his day was the metropolis of the Gauls. Tacit. *Germ.* c. 28, tells us the Trevirii were of German origin. It follows of course that the Gauls and Germans spoke the same language. Again, the Scordisci and Bastarnae spoke the same tongue, «*Bastarnae Scordiscis lingua et moribus aequales*» Liv. 40. *c.* 57. L. 41. *c.* 19 ; but the Bastarnae spoke also the same language with the Germans, Tac. *Germ.* c. 46, Strabo 7.306. From all which he thinks it proved that the inhabitants of Britain, the Gauls, Pannonians, and Bastarnae did not differ in language. Strabo. L. 7.303, sais the language of the Thracians was not different from that of the Getae, but these were the same with the Goths admitted to have spoken the Teutonic language. Another proof he brings that the language of all the inhabitants of antient Celtica was the same, is that the names of places in all parts of it were the same, and produces instances. He proves the modern German descended from the Celtic by a number of instances, most of which however are evidently from the Teutonic language. He endeavors to answer objections drawn from Caesar. L. l. c. l, Ammian. Marcell. L. 15. c. 2, Strabo. 4, Caesar L. l. c. 47, Sueton. *Caligula.* c. 47, and Tacit. *Germ.* c. 43, Pell. *hist.* c. 15. et id. *sur les Galates. c.* 5.

712. He sais that as Gaul was divided into three Celtic nations the Aquitani, Belgae, and Celtae so Germany was occupied by five different nations « les Vindiles, les Ingevons, les Istevons, les Hermions (of whom the Suevi were a part) et enfin les Peucins, ou Bastarnes » *id. ib.*

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(1) Post. 716. *Note of Jefferson.*

713. The custom of painting the body was not common, sais Pelloutier to all the Celtic tribes. We do not read of it among the Gauls and Germans, but it was in use among the Iberi or Spaniards, the Silures of Britain, Tac. *Agric. c. 2.* Justin XLIV. 4, the Britons in general Caes. *V. 14*, Pomp. Mela. *III. c. 6*, the Agathyrsi or Thracians Virg. *Aen. 4. 146.* Cic. *Off. lib. 2. c. 7*, the Illyrians, the Daci, Sarmatians, Plin. *N. H. lib. 22. c. 1*, Caledonii. Isidor. *lib.* 2. *v.* 247, the Scotti, id. *Orig. lib. 9. c. 2*, the Geloni, Virg. *Georg. lib. 2. v. 115*, Mossyni, Pomp. Mela. *lib. 1. c. 19*, Mosynaeci, Diod. Sic. 14. Pelloutier observes we must not confound this practice with that of cutting the face with a razor which was usual among those he calls the Sarmatians, as the Hunns, Amm. Marc. lib. 31. c. 3, Jorn. *de Hunnis. c. 24. 49*, and the Turks, Menand. in *Excerpt. legat.* Pellout. *livre 2. c. 6.* Perhaps attention to this custom may assist towards a discovery of what people were of Celtic, and what of Gothic origin.

714. Another distinction between those Northern nations seems to be hinted by Tacitus Germ. c. 43. « Gothinos Gallica, Osos Pannonica lingua coarguit non esse Germanos, et quod Tributa Patiuntur ». *Pell. hist. L. 2. c. 14.*

715. Il faut faire nos reflexions sur un passage de Strabon, qui exprime avec beaucoup de netteté et de précision de quelle manière les Galates de l'Asie mineure furent gouvernés, aussi longtemps qu'ils formèrent un peuple libre et indépendant. Strabo. XII. 567.

Τριων δε οντων εθνων ομογλωττων, καὶ κατ' αλλο ουδεν εξηλλαγμενων, ἑκαστα διελοντες εις τετταρας μεριδας, τετραρχιαν ἑκαστην εκαλεσαν, τετραρχην εχουσαν ιδιον, και δικαστην ἑνα, και στρατοφυλακα ἑνα ὑπω τῳ τετραρχῃ τεταγμενους, ὑποστρατοφυλακας δε δυο. ἡ δε των δωδεκα τετραρχων βουλη, ανδρες ησαν τριακοσιοι· συνηγοντο δε εις τον καλουμενον Δρυναμετον. Τα μεν ουν φονικα, ἡ βουλη εκρινε· Τα δε αλλα δι τετραχαι, και δι δικασται. παλαι μεν ουν ην τοιαυτη τις ἡ διαταξις. καθ' ἡμας δε εις τρεις, ειτ' εις δυο ἡγεμονας, ειτα εις ἑνα ἡκεν ἡ δυναστεια, εις Δηιοταρον, ειτα εκεινον διεδεξατο Αμυντας · νυν δ' εχουσι Ῥω-

μαιοι, και ταυτην και την ὑπο τῳ Αμυντᾳ γεγομενην [πασαν εις μιαν συναγαγοντες] (1) επαρχιαν.

Ceux que (*sic*) liront avec un peu d'attention la Germanie de Tacite se convaincront facilement que les Galates avoient, à peu près, la même forme de gouvernement que les anciens habitans de l'Allemagne. Les trois nations Gauloises qui s'étoient établies dans l'Asie mineure jugèrent à propos de se partager en douze Tétrarchies, c'est-à-dire, en douze grands Cantons. C'est ce que Tacite a appellé Pagos et Civitates. Tac. *Germ. 12.* Chacun de ces grands cantons étoit subdivisé en quinze ou seize petits ; c'est ce que Tacite appelle Vicos ; et c'est de ces petits cantons qu'il faut entendre le passage de Pline. *V. 32. sup. cap. 1. n. 53.* qui dit, que les peuples et les Tétrarchies des Galates montoient ensemble à 195. Comme les Galates étoient tous soldats, un grand canton formoit ce que nous appellerions aujourd'hui un Régiment, et les petits ce que nous nommerions une Compagnie. Les douze grands cantons des Galates étoient, en quelque manière, des états indépendans, chacun avoit ses magistrats particuliers qui étoient choisis dans l'assemblée générale du canton, où tous les libres, capables de porter les armes, étoient obligés de se rendre. Tac. *Germ. 12.* Les magistrats étoient 1° Le Tetrarque ; c'est celui que les Germains appelloient Kiningus, et auquel les auteurs Latins donnent le nom de Rex, ou de Regulus. « *Reges ex nobilitate, duces ex virtute sumunt* ». Tac. *Germ.* 7. On le choisissoit dans les familles les plus nobles du canton. 2° Le colonel, que Tacite appelle Dux, dépendoit du Tetrarque, et commandoit les troupes du canton dans toutes les expéditions militaires. Les Germains l'appelloient Hertzog, ou Hertog. On déferoit ce commandement à celui qui passoit pour le plus brave du canton, et le colonel avoit deux Lieutenans-Colonels qui commandoient sous lui. 3° Le juge, que les Germains appelloient Graef, Graphia, décidoit avec ses assesseurs de toutes les affaires civiles. Comme les Galates étoient presque toujours en guerre avec quelqu'un des peuples voisins, les douze Tétrarchies pour mieux résister à l'ennemi commun, se réunissoient souvent par des députés qui formoient ce que nous appellerions le Parlement, la Diéte, ou le Conseil Général de la nation. Cette assemblée se tenoit dans un lieu appellé **Drynemetus** (**Dry-memt-Hus**) la maison des trois noms, ou des trois peuples. Elle étoit composée de 300 personnes, c'est-à-dire, que le Tétrarque, le Juge, le Colonel, et les Dieux (*sic*) Lieutenans-Colonels de chaque canton, s'y rendoient, accompagnés d'une vingtaine de notables tirés de la noblesse, du clergé et du peuple. Les affaires criminelles ne pouvoient se décider que dans l'assemblée même des 300 personnes, parce qu'elles appartenoient, parmi les Galates, comme parmi les Germains, à la haute justice, «*licet apud Consilium accusare quoque, et discrimen capitis intendere*», Tac. *Germ.* 12. Les autres affaires étoient aux Tétrarques, et aux Juges qui formoient une espèce de Chambre haute, dans laquelle la voix d'un Juge étoit aussi considérée que celle du Tétrarque, «*Principes gentis venturos, per quos aeque res transigi possit venturos*». Liv. *38.25.* Tac. *Germ.* 11. 12. Comme l'assemblée générale, dont je viens de parler, étoit chargée de régler tout ce qui regardoit le bien et l'intérêt commun de la nation, on y établissoit quelquefois trois, deux, ou même un seul chef, pour commander les troupes, et pour diriger les affaires. Ainsi lorsque les Romains, firent la guerre aux Galates, ceux-ci étoient gouvernés par trois tétrarques, Combomarus, Gaulotus, et Arbiagon ; et le dernier, qui étoit Tétrarque des Tectosages, n'épargnoit ni soins, ni caresses pour se faire déclarer chef de toute la nation. Pelloutier *sur les Galates. c. 6.*

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(1) The words in parenthesis were omitted.

716. The Gauls who passed into Asia minor 45 or 46 years after the death of Alexander the great, and 278 years before Christ, and who were afterwards called

Galatians, had just left the country South of the Danube and North West of Greece. Brennus having assembled a great number of them from Scordisci, Bastarni, Boii, Taurisci, Japides, and others, to make an irruption into Greece, a body of 20,000 of them separated from the rest and went to Bysantium and then into Asia. This corps consisted of Tectosagi, Trocmi, et Tolistoboii, Diod. Sic. *V. 214*, Appian. *Illyr. p. 1196*, Liv. *38. 16.* Seud. Tom. *p. 464*, Memmon. *c. 20*, Paus. *Achaie, VI. 537*, Strabo *XII. 566*, Pellou. *sur les Galates c. l. 2.* They settled in Bithynia, where they remained 37 years. Hence they removed into Phrygia, from which time the country they occupied was called Galatia. The three tribes took each a separate portion of the land. *ib. c. 3.*

717. Stanyan sais that the first kings of Greece were elected by the free consent of the people. They were considered chiefly as the leaders of their armies. Thucydides therefore observes that under Cecrops and the other antient kings of Attica till the time of Theseus the king was not consulted but in time of danger; for that each city had it's own magistrates and courts, by which they carried on the ordinary course of Government, and were a sort of commonwealth within themselves. The kings however from their credit and good conduct found means to enlarge their powers, to extend them to the Civil administration, and to become absolute. But coming in process of time to abuse their trust, the people, as opportunity offered, resum'd the power in their own hands ; and this gave rise to so many different forms of government in Greece. Stanyan's *Grecian hist. B. l. c. l.* (1).

718. Corinth planted it's two famous colonies of Syracuse and Corcyra being themselves a people engaged principally in trade and merchandise. Syracuse was settled under the conduct of Archias, Corcyra under that of Chersycrates. Syracuse, from it's soil, havens, and other conveniences, soon grew to be not only the metropolis of Sicily, but as large and beautiful as any city in Greece and Corcyra having the same advantages by sea, became so considerable, as to found two other cities in Illyrium, Epidamnus and Apollonia. (1) These colonies were at first subject to Corinth their metropolis, and were governed much after the same manner; but as they increased in power, they renounced their obedience. *ib. B. l. c. 4.*

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(1) Abraham Stanyan, *Grecian History down to the death of Philip of Macedon.* London 1739, 2 vols.

719. On a dispute between Medon and Nileus which should be perpetual Archon of Athens, Medon was preferred. Whereupon Nileus with the rest of his brothers led out colonies into Asia and there founded the twelve famous cities of the Ionians, which were Ephesus, Miletus, Priene, Colophon, Myus, Teos, Lebidos, Clazomenæ, Erythræ, Phocæa, with Chios and Samos belonging to the two islands of these names. *ib. B. l. c. 6.*

720. Solon founded a city in Cilicia, called from himself Soleis, and planted in it some Athenians, whose language being corrupted by that of the country, they were said to Soloecise. *ib.*

721. The Samians were an Athenian colony: yet when oppressed by Polycrates who had erected a tyranny among them, they applied to Sparta, not to Athens for assistance, which accordingly was granted them by the Spartans, without any offence being taken at it by the Athenians. The tyrant prevailing, those Samians who had been in the conspiracy retired into Crete, and built Cydonia. Slany, *Gr. hist. B. l. c. 6.* The Spartans and Aeolians having on a subsequent occasion freed the Samians from the Persian yoke, proposed to transplant them into Europe, fearing that in Asia they could not on all occasions be ready to relieve them. But the Athenians « who pretended the greatest right to dispose of them, as being their founders », opposed it, and promising to protect them in the defence of their liberty, they were continued in Asia. *ib. B. 2. c. 3.*

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(1) Qu. does he mean the last two mentioned only, or all four? *Note of Jefferson.*

722. Stanyan speaks of the inhabitants of Mycenæ throwing off their dependance on Argos. qu. what was that dependance, and whether they were a colony of Argos ? *ib.*

723. Epidamnus, or Dyrrhachium was a colony of Corcyra, as Corcyra was of Corinth. The Epidamnians had banished some of their factious citizens, who procuring assistance from their neighbors the Illyrians, so much distressed the Epidamnians that they were obliged to apply to Corcyra for assistance. This being refused by the Corcyreans, they applied to Corinth, gave themselves and their city up to them, on which they took them under their protection. To this the Corinthians were induced partly thro' pique to Corcyra, who having become wealthy and powerful by sea, was also become « insolent, so as to throw off all manner of dependance on her, even to the common marks of acknolegement due from a colony to its metropolis ». Hereupon the Corcyreans applied to Athens and obtained assistance. This step of the Athenians was considered as a breach of the treaty subsisting between them and the Spartans and Corinthians, and was one of the causes of the war which followed. The Athenians commanded the inhabitants of Potidæa, *a Corinthian colony, but tributary to Athens*, to demolish their walls, and to expel the magistrates sent to them yearly from Corinth. They refused to do so : whereon the Athenians laid close seige to the town. This was made a second cause of the Peloponnesian war. The Epidamnians and Corinthians now engaged on their side the Spartans, all the Peloponnesians (except the Argives and Achæans) the Megareans, Phocians, Locrians, Bœotians, Ambraciots, Leucadians, and Anactorians.

The Corcyreans and Athenians procured the confederacy of the Chians, Lesbians, Platæans, Messinians of Naupactus, the Acarnanians and Zacynthians, besides great part of the Asiatic Graecians. Thus, sais Stanyan, was all Greece drawn into the quarrel, the greatest part embracing the Lacedæmonian interest, as the cause of justice and liberty : the rest being detained by the Athenians more out of fear than affection. Stany. *Gr. hist. B. 2. c. 4. 5.*

724. The Athenians after taking Potidæa planted there a colony of their own. *ib.*

725. Pericles sent out many colonies of the Athenians : one of 1000 men into the Chersonese ; 500 men into the isle of Andros ; 1000 into Thrace, to dwell among the Bivaltae, a people there, and others into Italy when the city Sybaris was to be repeopled. The inhabitants whereof went by the name of the Thurians. He planted another colony in the island of Euboea, Plut. *Pericles*, and one also in the island of Aegina from which he expelled the former inhabitants. Plut. *Pericles.*

726. Amphipolis was an Athenian colony, and was taken from them by the Spartans in the Peloponnesian war. Stany. *B. 2. c. 5.*

727. The Melians, a Lacedaemonian colony, on being summoned to acknolege the Athenians as their sovereigns observed that « as they were a colony and confederate of the Lacedaemonians, they had good reason to expect assistance of them from a double tye of Honour and Consanguinity. » They were conquered by the Athenians who planted a colony of their own people there. Stany B. *2. c. 6.*

728. Sr. Walter Raleigh sais « that Athens maintained the weaker towns of Greece against the stronger, and so incroached on her neighbors, taking their *dependants* from them. Especially the Corinthians were much inraged because the people of the island Corcyra, their colony, ***which had rebelled against them***, and given them a great overthrow by sea, was by the Athenians taken into protection. Raleigh's *hist. world. B. 3. s. 8. s. 2.* (1)

729. Amphipolis, an Athenian colony, was the key to Macedon on one side. Philip, king of Macedonia, was therefore very desirous of getting it into his hands, but finding it necessary to keep some measures with the Athenians (having taken possession of it) he would neither keep it himself nor let the Athenians have it, but took a middle course « and declared it a free city, thereby leaving the inhabitants to throw off their *dependance on their old* masters and making it appear to be their own act. » *Stany B. 2. c. 1.*

730. The Syracusans were a Corinthian colony, having been enslaved by their tyrants they applied to Corinth for assistance and obtained it. By these means they soon recovered their liberties. Being much exhausted of it's inhabitants the Syracusans re-peopled it. They notified among all the Grecian states, that Syracuse had now recovered it's liberty, and invited all who were willing to go and settle there. «This generous proceeding of the Corinthians is taken particular notice of, that when they had it in their power to make themselves entire masters of Syracuse, they contented themselves with the glory of saving and replenishing it, and of being a second time the founders of it. *2. Stany. B. 2. c. 3.*

731. The Portuguese were the first who engaged in the African trade. In the year 1551 i. e. 5. Ed. 6, one Thomas Windham sailed to the coast of Africa, and is said to have been the first Englishman who was on that coast. In 1552 he went thither again with three ships and returned with sugar, dates, almonds and molasses. In 1553 he made a third voiage thither with three ships and traded for gold and pepper. During the reign of Q. Mary and the first 10 or 12 years of Elizabeth many private ships adventured there, but the English having as yet no colonies in America, and so no occasion for negroes, they traded chiefly for gold, elephant's teeth, malaguetta, etc. In 1562 i.e. 4. Eliz. Sir John Hawkins with three ships went to the coast of Guinea, where partly by force of arms, partly by other means he got into his possession 300 negroes which he carried and sold to the Spanish settlement in Hispaniola. In 1564 he made a second voiage with several ships and sold his negroes to the same and other Spanish settlements. In 1567 he made a third voiage to Guinea with 6 ships, where he took in about 500 negroes which they carried to the islands in the Spanish West Indies. Postlethwayt, voce *English-African company*, 1. Lediard's *naval hist.*, 115, 141, 145, 1. Campbell's *lives of the admirals*. 385 (1).

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(1) Sir Walter Raleigh, *History of the World*, 1614 etc... 11th édition published in 1736.

732. Edmund 1, is said to have been the first king of England by whom capital punishments were instituted. Orrery's *hist. Engl. letter 8* (2). He reigned from A. C. 940 to 946.

733. The feudal law was introduced into England at and shortly after the Conquest. Spelman's *law terms*. c. *8*. (3).

734. Feodum is derived from the Saxon feo, feh, feoh, munus, stipendium. Anglicé, fee, rewards, salary and Hode, Hadè Head, condition, state. So that Feo-hode, signified lands given by the lord to a tenant by way of salary or stipend for his services. Allodium is derived from All, English, all and hode. All-hode denotes lands possessed totally ; not held « *in dominico suo, ut de feodo* » but « *in dominico suo, ut de jure* » the owner having both the *dominium directum et utile*, whereas the feuditary had but the *dominium utile*. These lands were possessed *pleno jure*, *integrè*, *ex toto*, *ex solido*, quit of all services, without acknolegement of any superior lord, de *deo et sole*, or as other absolute princes *Gratiâ dei*, in a word « in totality, or all-hood ». The Allodial lands seem to have been the same with the Boc-Land, and the Feudal the same with the Folc-Land. Somner's Gavelk. 108-111. The Bocland before the conquest alienable by conveiance inter vivos, or by will ; and if not aliened it descended as the Gavelkind lands. ib., 86, 87, 88, 89, but Spelman sais the Bocland was not alienable : Spelman. *Gloss*. *Bock-land* (1).

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(1) Malachy Postlethwayt. *The Universal Dictionary of Trade and Commerce*. London 1751. Thomas Lediard. *The Naval History of England, in all its branches ; from the Norman Conquest, in the year 1066 to the Conclusion of 1734*. London, 1735. John Campbell, *Lives of the Admirals*, 1742-44, 4 vols.

(2) I have been unable to identify this quotation.

(3) Sir Henry Spelman. *De Terminis Juridicis*, 1684, etc.

735. Our ancestors held their lands either by writing, which was called Bocland, or without writing which was called Folcland. The land held by writing « *commodiori erat conditione*, *hæreditaria*, *libera*, *atque immunis* » : but the land without writing « *censum pensitabat annuum, atque officiorum servitude quædam est obligatus. priorem viri plerunque nobiles, atque ingenui, posteriorem rustici fere et pagani possidebant. Illam nos vulgó Freehold, et per chartam, hanc ad voluntatem domini appellamus — hæreditatem vero temporibus illis non (quemadmodum apud nos) solus ætate maximus adibat, verum ad filios omnes æqualiter fundus lege veniebat, quod illi Landescyftan, dixerunt, et Cantii hac nostra memoria eodem vocabuló To Shift Land, id est, herciscere, et fundum partiri, appellant atque hinc ego usu tandem evenisse credo ut terra illa Gavelkin, quasi Gifecalcyn, id est omnibus cognatione proximis data, dicatur* ». Lamb. Arch. Glos. *verbo* Terra Ex Scripto (post 848). Dalrymple states this matter differently. He sais the Germans in none of their conquests assumed the whole lands to themselves, *L'esprit des lois. L. 30. c. 8.* The antient inhabitants were allowed to retain a part on the antient footing. Such of the intruders too as were attached to no chieftain took possession of any vacant lands they found and enjoyed them on the same footing. Both held without any grant from the prince, and, when writing came in, without writing. These he would have to be the Folc-Land, but it being necessary to reduce in a political those who were not subjected in a feudal capacity, the king sent his own officer, the Reve, to judge and to lead to war the possessors of these lands. Hence they were also called Reve-Lands, and were the same with the Allodial Lands. On the other hand, the lands granted to the Thanes or Lords were called Thain-Land ; and being held by charter, were also called Boc-Land, and are the same with the Feudal Lands. The Allodial possessions are « celles qui ne recognoissent supérieure en feodalitè et ne sont sujets à faire, ou à payer aucuns droits seigneuriaux » *Reform. custom.* art. 102, attached to no lord in a seignoral, but to the king alone in a political capacity. Great part of the book of Doomsday is taken up with an account of the conversion of Allodial into Feudal estates; and sometimes with the conversion of Feudal into Allodial ; « *haec terra fuit tempora Edwardi Thainland, sed postea conversam est in Reveland* ». Doomsd : *tit. Herefore.* He acknoleges this to be different from the accounts of Bocland and Folcland hitherto given by Lawyers, Historians and Antiquaries. Dalr. *Feud. Syst.c. 1* (1).

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(1) Sir Henry Spelman, *Glossarium Archaiologicum*, 1664, 1687.

736. Spelman sais that the invention of Feudal holdings has been ascribed by some to the Franks, by others to the Longobards, others to the Germans, and that some traces of it have been thought to be found in the laws of the Anglo-Saxons. As all these nations therefore drew their origin from the Germans, it may be supposed that the resembling parts of their laws and customs were derived from the common source. The feudal principles, originated in Germany, were greatly enlarged and polished by the Longobards. William the conqueror first brought the Feudal services into Britain. Upon that system brought from Normandy he divided *all*

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(1) See # 569.

England among his souldiers. After this all things resounded with the feudal *oppressions*, which in the time of the Saxons had never been heard of. *Gloss. Feudum.*

737. Spelman sais that at this time «*nemo in universã Angliã ita quidpriam gaudet in Alodio ut dicatur instar Hannoniæ principis solummodo de deo et sole tenere: sed vel mediatè vel immediatè omnes a corona regni. Spelm. Glos. Feodum.* «In the law of England we have not properly Allodium, that is, any subjects land that is not holden mediately or immediately of the king », Co. Lit. 1. Somner however informs us of the contrary : to wit that after the conquest there were charters to St. Lawrence Hospital and Christchurch mentioning land holden by the owners for which they were responsible to none, also the Pinenden plea for the Archbishops lands of Canterbury, and the grant in Alodium mentioned in Eadmer, and he even sais that « *at this day* diverse of the Canterbury houses and grounds pay no quitrent at all », and he conceives them to be the remains of the antient Bocland, which seemeth to be still surviving in them as if holden *in Allodium pleno jure*, without all manner of chargeable services ». It belongs to the king alone to grant out or pass land in Allodium. Somner. *Gavelk. 122. 126* (1).

738. Somner (contrary to the opinion of Dalrymple, and surely he was the better Saxon scholar) affirms that the Bocland was the same with the Tain-land and with the Allodium. He cites a passage from a deed in lib. Hosp. S. Laurentii propè Cantuar. to St. Laurence Hospital founded anno 1137, « *duo messuagia quæ sita sunt in terra de Bocland de qua nulli respondeo*, etc. », which is known to have been peculiar to Allodial property. He produces also other proofs. He sais the Tainland was so termed because the Bocland or Allodium was properly tenable by Thanes. He thinks the words

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(1) William Somner. *A Treatise of Gavelkind, both name and thing.* London 1660, 2^{d} Edition 1726.

Thanes, Thegnes, Threnges, Drenches, and Allodiarii synonimous, and that they mean such Liberales, ministri, fideles, servientes, nobiles, as holding some portions of Allodium or Bocland did « *militiam ex arbitrio tractare, nullius domini imperio evocati, nulloque feodali gravamine coerciti* ». If this be so, then the Kentish Allodiarii were such as had not opposed the Conqueror, whilst others of the county resisting him forfeited their possessions, contrary to the story Spot tells. Somn. *Gavelk. 121, 127.*

739. Somner is of opinion that Gavelkind is a tenure, and not a custom. It's principal properties are, Dower of the moiety, loss of dower by marriage, descent to all the sons, not forfeitable for felony, power of alienation at 15 years of age. But after giving the arguments on both sides of the question: Whether Gavelkind lands were deviseable before the stat. of wills ? he declares it to be his opinion that they were not. Somner. *Gavelk.* 152, 170.

740. Somner concurs with those who think feudal tenures were introduced by the Conqueror, Somn. *Gavelk. 112.* If the feudal regulations prevailed at all among our Northern ancestors, before their irruption into the Southern countries, it must have been in a very infantine state, for from a passage in Caesar we find the Germans even in his day had no fixed property in lands. «*Neque quisquam agri modum certum, aut fines proprios habet ; sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt*». *Caes. L. 6. c. 20* — and Tacitus « *arva per annos mutant, et superest ager*». Tac. *de mor. Germ. 26*. Blackstone explains the footing on which the feudal system was introduced, and now stands in England thus: The constitution of feuds had it's original among the military policy of the Northern nations, and was carried by them into their several colonies as the most likely means to secure their new acquisitions. To this end large districts of land were [*dealt* ?] by the conquering general to the superior officers who dealt them out again in smaller parcels or allotments to the inferior officers and most deserving souldiers. These allotments were called « *feoda* » fiefs, fees, or rewards. The condition annexed was a service of some kind to him by whom they were given, but this feodal polity seems not to have been received in England, at least not universally and as a part of the national constitution, till the reign of William the Norman. There is reason to believe indeed from abundant traces in our history and laws, that even in the times of the Saxons something similar was in use, but not so extensively as among the Normans. The Saxons were settled here so early as 600, whereas feuds did not attain their full vigor even on the continental parts of Europe till two centuries after this. William seems not to have introduced the feodal tenures by his mere arbitrary will, nor immediately after the conquest ; but they were gradually established by the Norman barons and others in such forfeited lands as they received from the gift of the conqueror. From the prodigious slaughter of the English at the battle of Hastings, and subsequent insurrections he acquired very extensive possessions which he gave under feodal holdings to his followers (1). In the 19 th year of his reign an invasion was apprehended from Denmark ; and the military constitution of the Saxons having been laid aside and no other introduced, he brought over and quartered on the people a great army of Normans and Bretons. This induced the nobility to listen to the king's remonstrances and proposals for adopting the feodal system of defence. The great survey called domes'day book was made the next year, and in the latter end of the year all the principal landholders attended the king at Sarum, submitted their lands to the yoke of military tenures, became the king's vassals and did him homage and fealty. *Chron. Sax. A.D.* 1086. Perhaps the very law then made is the one now extant. *L. L. W. 1. c. 52*, to which may be added also c. 58. This new polity therefore seems not to have been imposed by the conqueror but adopted by the general assembly of the whole realm. In consequence of this change it became a fundamental maxim « that the king is the universal lord and original proprietor of all the lands in his kingdom and that no man can hold any part of it but what has mediately or immediately been derived as a gift from him to be held on feodal services ». For this having been truly the case in pure, original and proper feuds other nations who adopted the system were obliged to suppose the same principle as a foundation for their new polity, tho' the fact were far otherwise. The Norman interpreters, skilled in all the niceties of the feudal constitutions, hereupon contrived to introduce all the rigors of the system, as if the English had in fact as well as theory owed every thing they had to the king's bounty. Our ancestors, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown as the basis of a military discipline, with reason looked on these deductions as arbitrary impositions drawn from principles that as to them, had no foundation in truth, and when H. I. set up his pretensions to the crown, they took advantage of the occasion and procured a restitution of the antient Saxon laws, which he made by the great charter prefixed to his laws. By this he gave up the greater grievances, but still reserved the fiction of feodal tenures, for the same military purposes for which it had been introduced. This shews that English liberties are not infrigements merely of the king's prerogative, extorted from our princes by taking advantage of their weakness ; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman Lawyers, rather than deprived by the force of the Norman arms. 2. Blacks. *1. c. 4.* (1).

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(1) The same ideas, expressed almost in the same words, will be found in the *Summary view of the rights of British America.* « The lands which had belonged to those who fell in the battle of Hastings, and in the subsequent insurrections of his reign, formed a considerable portion of the lands of the whole kingdom... *M. E. I, 206.*

741. At Common law, none having any office concerning the administration of justice might take any FEE from the subject *for the doing of his office*. 2. Inst. 1761. Inst. 368. b.. The sheriff was sworn, among other things «*neque aliquid recipere colore aut causâ officii sui ab aliquo alio* QUAM A REGE ». Fortesc. c. 24. No sheriff nor other officer of the king shall take any reward *to do his office* but shall be paid of that which they take of the king, on pain that they render double to the party and be punished at the king's pleasure. stat. West. 1. c. 26. This relates to all officers whose office does any way concern the administration of justice. 2. *Inst.* 209, and this was the antient Common law and was punished by fine and imprisonment, but the stat. added the aforesaid penalty. Co. L. 368. b. 2. *Inst.* 176. There can be no prescription against the stat. of Westm. 1. 4. *Inst.* 2. The stat. of Westm. is in affirmance of a Common law maxim which is « *non capiant vicecomites vel alii ministri reges præmium, vel mercedem, vel aliquid pro officio suo faciendo, sed tantum de feodis suis* A DOMINO REGE *sint contenti*». The sheriff or any other minister of the king cannot prescribe to take a fee *for doing of his office* : but the fee of 20^{d} called bar fee time out of mind taken by the sheriff of every prisoner that is acquitted is not against this stat. or any other, for it is not taken for doing his office. *2. Inst. 210.* A coroner received 1^{d} of every visne when they came before the judges in eir, *as belonging to his office* ; which was neither against the Common law, nor this statute of W. 1, for he took it not *for doing his office*, but a right due to his office, which might have a reasonable beginning viz. for and towards travail, attendance and charges. *2. Inst. 176.* At this day officers can take no more for doing their office than have been since this act W. 1. allowed to them by authority of parliament. 2. *Inst. 210.*

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(1) The exact reference would be Blackstone, Book II, chapitre IV, 45-53.

742. Fees do somewhat differ by CUSTOM in several counties. Thus from a table of fees taken by the clerck of Middlesex and Surry counties it appears that they differ greatly. *Complt. Atty. 45.* A customary fee was condemned because the custom was *unreasonable.* Topsall v. Ferrers. *Hob. 175.* (*this implies that had the custom been reasonable it would have been good, and consequently that fees might be established by custom*). If a person pleads his pardon the judges may insist on the usual fee of gloves for themselves and officers before they allow it. *2. Hawk. c. 31. sect. 71.* and cites *Fitz. Coro. 294. 4. L. 4. 10. b. 2. Jon. 56. 1. Sid. 452. pl. 18. Kelv. 25. Pulton de pace. 88. a.* (*I have examined only b.* Jon. 56. *of the authorities cited by Hawkins. There it is stated to have been a question whether they could allow a pardon which did not recite or mention the indictment ? The judges, determined they might allow it, and discharged the prisoner « et apres solonque le custome donoit gans a touts les judges », so that here was no question as to the right to the fee. But Hawkins' position is inconsistent with the general spirit of the laws of England on the very face of it. Can it be believed that if a wretch is so poor as not to be able to purchase a few pair of gloves sentence of death is to be passed on him ? the crime of felony being done away by the signing the pardon, he now stands chargeable only for fees, the nonpaiment of which are in no instance punished capitally*). Bacon sais it is extortion for any officer to take more for executing his office than is allowed by act of Parliament « or is the known and settled fee in such case. » *2. Bac. abr. 464.* and cites *10. Co. 102. a. Co. Lit. 368*, (but his authorities do not justify the latter words. Both books say only that it is extortion «to take quod non est debitum, vel quod est supra debitum, vel ante tempus quod est debitum ».) The same compiler sais

« all fees allowed by acts of parl. become *established fees* and the several officers intitled to them may maintain actions of debt for them». *2. Bac. 464.* and cites *2. Inst. 210,* (but there is not a single word of it there. If therefore it be supposed that this passage gives to fees, which have for some time subsisted under a temporary act of legislature, the authority of *custom*, it must be answered that the citation is as false as it's doctrine is absurd. To say that a regulation introduced by a temporary law, shall when that law expires, continue a law under that temporary usage or custom, is to make a difference between temporary and perpetual acts.) The L. of Devonshire claimed the cast away iron ordnance, shot and munition as fees and avails belonging to his office of Master of the ordnance, and offered to prove a continuance of the custom for 60 years past. But it was answered and resolved that he could not claim them as fees or avails belonging to his office, for the sd office was erected *of late time* to wit, by letters patent. *35. H. 8.* and he cannot claim them as *antient fees by prescription to a new office*. L. of Devonshire's ca. *4 Jac. 1. 11. Co. 90. a.* The clerk of a market claimed a fee for viewing and examining measure and alleged that these fees had been *of long time* taken: but the judges said that «*malus usus abolendus est* » *temp. Eliz. 44. Inst. 27.* No prescription agt. a stat. ibid. see. post. 748.

743. *The Statutes Westm. 2. c. 44. 13. E. 1. 8. R. 2. 11. H. 4. c. 4. 7. H. 7. c. 3. 29. El. c. 4. 29. Car. 2. c. 5. 4. W. M. c. 4. 5* and *6 W. M. 3. G. 1. c. 15.* fix the fees of several officers.

744. Case for serving the def. as a Commissioner for the examination of witnesses under a commission from the exchequer. It was moved in arrest of judgmt that there was no consideration it being unlawful to take money because the service is by command of a court. To which it was answered that it was for labor and pains bestowed at the def's request, he having named the pl. as a commr. the pl. was not bound to do this by any oath of office. He cited the case of Bagsher v. Salter. Noy 76. def. promised pl. 40.s. if he would get a special warrant from the sheriff and arrest J. G. On motion of arrest of judgment the assumpsit was ruled void by 43. H. 6, but one Audley's case was cited and agreed where an assumpsit was held good when made to *a stranger* to go and help the sheriff and said the reason of the case of Bagshar v. Salter was that he was an officer and such practice would promote extortion. So of a bailiff, but otherwise of a stranger. et per totam cur. judgm. for pl. *1. Show. 342.* Stockhold v. Collington S. C. *Comb. 186.* Holt. 7. where it is said «by C. J. et Eyres (*caeteris lacentibus*) the action lieth and judgm. pro quer». S. C. Salk. *330.* stated to have been not Assumpsit but Quant. mer., and he sais the court determined for pl. because «he is appointed at the nomination of the party, who ought to pay him if he employs him». The case of Bridge v. Cage. *2. Cro. 103*, is thus : the def. had for his friend promised the pl. (who was an undersheriff) 60 in considñ that he would execute a writ of elegit, and also in consideration of 6ᵈ given him by the under sheriff. Moved in arrest of jdmt that here was no consideration the sheriff being by his oath obliged to execute the writ ; and that it is quasi extortion. Answered that this sum was no more than his fees under stat. 29. El. c. 4, but determined that does not help the case, for that stat. only excuseth him for taking his fees against the Common law which did not permit him to receive anything. Warburton said it had been often adjudged the sheriff cannot maintain an action for his fees given by that stat. judgmt for def. In Gurney et Some's case. *1. Cro. 335*, the court held (tho' there was no judgmt given) that an action could not be maintained for a sheriff's fees, but in Stanton v. Suliard 1. *Cro.* 654, three justices against one were of opinion an assumpsit might be maintained for the fees given by that stat. The execution having been made at the request of the def. and by the stat.

the sher. may lawfully take his fees and therefore may take a promise to have them paid him.

745. *Nulli vendemus, nulli negabimus aut differemus justitiam vel rectum. Mag. chart. c. 29* ; (*but if the king's justices refuse to do justice but on paiment of such fees to the king's officers as they, or in other words the king, assesses, is not this a sale of justice ? At the time of passing the* magna charta *the king supported his own officers of justice, since that incidental fees were allowed them by a temporary law. While this continued it was indeed a sale of justice, but a sale authorized by a law which had so far suspended the operation of the* magna charta. *But when the suspending law expires, the* magna charta *resumes it's force.* By the *34. E. 1. c. 1.*«*Nullum tallagium* etc., *ponatur seu levetur sine voluntate et assensu Archiepiscoporum, etc., et aliorum liberorum comitum de regno nostro*». Within this stat. are all new offices erected with new fees and old offices with new fees; for that is a talliage upon the subject. The king had erected an office for the measurage of cloths and canvas with a fee, but *13. H. 4*, the Commons petitioned against it as illegal et it was revoked by the king and also condemned in the K's Bench. So E. *3.* granted an office for measuring worsteds with a fee, which the Commons resolved to be void, and was revoked by authority of parliament. *2. Inst. 533*, at this day the ministers of the king can take no more *for doing their office* than has been since the stat. W. 1, allowed to them by authority of parl. *2. Inst. 210.* Bacon sais «such fees as have been *allowed by the courts of justice* to their officers as a recompense for their labor and attendance *are established fees*, and the parties cannot be deprived of them without an act of parliament». *2. Bac. — 464*, and cites for the first part of the sentence *21. H. 7. 17. Co. L. 368*, and for the latter part *Pr. Ch. 551.* I have not seen *21. H. 7. 17*, but *Co. L. 368*, is in these words, «such reasonable fees as have been *allowed by the courts of justice of antient time* to inferior ministers and attendants of courts for their labor and attendance, if it be asked and taken of the subject, is no extortion» and cites among *21. H. 7. 17.* (here then he does not say (as Bacon would make him) that fees *allowed by courts* of justice are *established fees*, but fees allowed by them of *antient time* are established fees. So that he must be understood as making the Custom from time immemorial to be the basis, and not the allowance by the courts). Again *Pr. Ch. 551*, the Chancellor only sais « if the Serjeant at arms is entitled by the *antient course* to a fee on the caption of a person in contempt, it cannot be allowed without an act of parl ». (So this only proves that fees established by custom, cannot be altered but by act of parl. and not that fees allowed by courts cannot be altered but by act of parl. as Bacon cites it.) An action by the promoter of the king (his atty. I suppose) upon the stat. of extortion agt. an undersheriff for taking the bar fee of 20^{d}. The undersheriff gave in evidence the existence of the fee from time immemorial. The court determined it to be out of the statute, and no extortion and sais « ceo fee fuit *assigne par la court* pur barre fee per lour discretion in consideration del grand charge que le viscount ad in garder amesnant et in reamesmant les prisoners,et in garder le number del servants de eux amesner, etc.» Bro. *abr. Feis del court. 6.* (The saying « this fee was assigned by the court » is a loose expression of the reporter, or abridger, or perhaps of the court, as will appear on reflecting that the custom having existed from time immemorial, no mortal could say that it arose at first from the allowance of the court, or from what other authority. If it be supposed this recent origin of the custom was asserted from knolege or evidence that it was such, then it destroys their judgment, because it is no longer a custom from time immemorial, since they can give evidence how, and consequently when it arose). Hawkins states the case of the bar money and the distinction in the books that it is not *for doing his office* but is *annexed to it*; and sais there is no need for this distinction

« for it cannot be intended to be the meaning of the statute to restrain the courts of justice in whose integrity the law alwais reposes the highest confidence from allowing reasonable fees for the labor and attendance of their officers ». Hawk. c. 68. cites *21. H. 7. 17. 2. Inst. 176, 210. S. P. C. — 49.* A. (Here Hawkins departs from his authorities as he sais himself, and assigns a contrary reason for the legal position laid down by them. Those who think his authority greater than that of the books he cites, will take his and not theirs, to be the true legal reason. I am not of his school). The Register in an ecclesiastical court libelled there for fees, and a prohibition « was granted; for *the court has no power* to compel the party to pay fees to their officers, but they must bring their Quant. meruit, or if the office be a freehold they may bring an Assise ». Piallard. v. Gerard. *Salk. 333.* « Gifford was libelled against in the ecclesiastical court for fees; and upon motion a Prohibition was granted, for *no court has a power to establish fees* ; the judge of a court may think them reasonable, but that is not binding : but if on a Quant. mer. a jury think them reasonable, then they become *established fees*. Gife. Hardr. 351. Giffords ca. *Salk. 333. 5. Mod. 238.*

746. There were no Costs at the Com. law. The stat. of Glocester c. l. first provided that in all cases where damages should be recovered the pl. should recover the « costs of the writ purchased » together with his damages. This « extends to all the *legal costs* of the suit, but not to the costs et expenses of his travel and loss of time » *2. Inst. 288.* Upon this statute it became the duty of the jury to assess costs (i. e. the *legal costs* as Ld. Co. expresses it, or costs established by law, and not his expences of travel etc.) assessing damages and costs in one gross sum if they please. *10 Co. 116.* a. But by a rule of court they are directed to tax them apart from each other that so it may appear to the court whether they have taxed costs or not. *Roll. Abr. 517*, for if they neglect or refuse to find costs where costs ought to be paid the court is under the stat. of Gloster in duty bound to supply the defect. *2. Saund. 257.* Green v. Cole. So if they award costs where none are paiable the court will not give judgmt on that part of the verdict which relates to the costs. Rep. Pr. in *C. B. 7.* Stores v. Tory. Subsequent statutes viz. *23. H. 8. c. 15. 4.* Jac. *1. c. 3. 8* et *9. W. 3. c. 11.* have given costs to defs. in all cases where the pl. would have recovered them. (So that the right of taxing costs is in the first instance lodged in the jury. If they fail to do it, the court then give judgmt for the damages and for costs *de incremento*, that is, in addition to the damages. *Gil. H. C. B. 261.* Juries knowing this, and being generally acquainted with all the petty fees of offices have usually left the taxation of them to the court ; who are to tax these costs which the jury should have done, i. e. the *legal costs* as Ld. Co. sais expressly, or costs established by law and not the costs of travelling, or any other arbitrary sum which they may please to fix upon and Christen by the name of costs de incremento). See. *1. Stra. 420.* Cutler v. Goodwin. Several counts, damages assessed separately by the jury, but costs to wit 20, were given without saying if on one, or all the counts. The pl. released the damages on all the counts but one, on which he had judgm̃t with costs *de incremento.* The court saying «the jury give the same costs in all cases, and if the def. is put to any *particular expence* as to the bad count, the court can make him an allowance in the costs they give *de in remento.* » (By this it is presumed they mean that in supplying the *legal costs* which the jury had quitted to give the pl. the court would deduct so much as to repay the def. any particular expence he had been put in pleading to the bad counts, so that still their costs *de incremento* were to be *legal costs*).

747. ACTS OF ASSEMBLY RELATING TO FEES are as follows:

1661. c. 137. Purvis. 101. entitled « Clerks fees to be paid. » perpetual.

1680. c. 16. Purv. 278. perpetual.

1718. c. 1. Beverly's abr. 138.

1727. c. 15.

1734. c. 10. to continue 2. years.

1736. c. 8 to continue 2. years et from thence to the end of the next session.

1738. c. 10. to continue 4. years et from thence to the end of the next session.

1744. c, 15.

1746. c. 6. to continue 3. years.

1748. c. 57. to continue 4. years.

1764. c. to continue 2. years.

1768. c. to continue till Apr. 12. 1769.

1769. c. 9. to continue till Apr. 12. 1771.

1772. c. 4. to continue till. Apr. 12. 1774. at which time it expired.

748. *Consuetudo*, Custom is one of the main triangles of the laws of England, those laws being divided into Common law, Statute law, and Custom. Of every custom there be two essential parts : Time and usage. Time out of mind ; and continual and peaceable usage without lawful interruption. Co. L. 110. V. If there be any sufficient proof of (*two words erased*) to the contrary, albeit it exceed the memory or proper knolege of any man living, yet is it within the memory of man : for memory or knolege is twofold : first knolege by proof, as by record or sufficient matter of writing. Secondly by his own proper knolege. A record or sufficient matter in writing are good memorials, for *Litera scripta manet*, and therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said *tradere memoriæ*, and this is the reason that regularly a man cannot prescribe or alledge a custom against a statute, because that is matter of record, and is the highest proof and matter of record in law. But yet a man may prescribe against an act of parl. when his prescription or custom is saved or preserved by another act of parl. *Co. L. 115 a.*

749. The UNION OF UTRECHT entered into in 1579, by the Dutch states was to the following effect.

The seven provinces are never to be divided by testament, donation etc. Each reserves it's particular privileges, rights, customs and statutes « in adjudging whereof, or differences that shall arise between any of the provinces, the rest shall not intermeddle ».

To assist one another with life and fortunes against all force and assault made on any of them.

All frontier towns belonging to the union, if old, to be fortified by the province where they lie ; if new, by all the provinces.

All inhabitants from 18 to 60 years to be trained to war. Peace and war not to be made without the consent of *all* the provinces : other cases « that concern the management of both » by most voices. Neighboring states to be admitted into the union.

In case of difference between provinces, if it concern one only, to be accomodated by others ; if concerns all, to be determined by the Stadtholders. Sentence to be pronounced in a month.

The Mint to be governed by all the provinces.

The interpretation of these articles is in the States ; and if they differ, in the Stadtholders.

They bind themselves to fall upon and imprison any who act contrary to the articles of this union.

The GOVERNMENT of these states is on the following plan. There are 3 colleges, to wit. the STATES GENERAL, the COUNCIL OF STATE, and the CHAMBER OF ACCOUNTS.

1. the STATES GENERAL. — The sovereign power of the united states lies effectively in this assembly.

It used to be convoked by the Council of state on extraordinary occasions, but consisting of 800 persons, meeting at one place, was too great a shape to the whole body, and made debates too long. An ordinary council called the STATES GENERAL was hereupon instituted to sit constantly in the court at the Hague. This represents the sovereignty of the union, gives audience and dispatches to all foreign ministers. It is however but the representative of the States General, the assemblies whereof are totally disused.

To this every province sends deputies in what number they please. Some send 2 etc. to 12.

They vote by provinces, not by persons, each province having one vote only. The time of the deputies continuing in office differs at the will of the respective province, some sending for year or years, some for life.

Stadtholders, governors, and persons in Military charge are excluded sitting here. Every province presides a week in turn, by the most qualified of it's deputies, who proposes all matters in the assembly, makes the Greffier read papers, puts the question, calls the voices of the provinces, and forms the conclusion. If he refuses, he resigns the place to his successor. A plurality of voices determines in every thing, except Peace and war, Alliances, raising or coining money, the privileges of each province ; in which all must be unanimous. In these articles, and also in chusing ambassadors, and answering foreign ministers, the deputies go to consult their respective states, who are really the sovereigns, while this ordinary council only represents the sovereignty.

2. The Council of State : this is subordinate to the ordinary council called the States General. It used formerly to judge of the necessity of convoking the States General ; but that is now disused.

It is composed of deputies from the provinces, and each deputy presides in turn.

The Governor sits here and has a decisive voice : the Treasurer general sits also, and has a deliberative voice, but no vote. They continue for year, years, or life, as each province chuses.

This council executes resolutions of the States General, proposes raising troops, and monies, superintends the milice, the fortifications, contributions out of the enemy's country, forms and disposal of pass-ports, revenues and government of places conquered since the Union, which belong alwais to the whole. Towards the end of the year they form an estimate of the expences for the next year, and present it to the States General. They dispose of money destined for extraordinary affairs, and expedite orders for the whole expence of the state on the resolutions first taken in the main of the States General. But the orders must be signed by three deputies of different provinces, and by the Treasurer General, and registered in the chamber of accounts, before the Receiver General pays them.

3. The Chamber of accounts: this is subordinate to the States General. It examines and states all accounts of the several receivers, controuls and registers the orders of the council of state disposing of finances. It is composed of 2 deputies from every state, who are changed every 2 years.

The Council of Admiralty is subordinate also to the States General. When a fleet of a certain force and number is destined, this council disposes of all the Marine affairs, as well in choice of equipage of ships, as in issuing money for the service. This college is subdivided into five, each sitting at a different place convenient to the Sea ports. They take cognisance of crimes committed at sea, pirates, frauds, or negligences in customs. Captains and superior officers are chosen by these colleges; and the number of men to each ship appointed by them, the captain victuals his own ship at so much per man, and on their good conduct in this, they are advanced or depressed by the Admiralty.

The Prince Of Orange: he was governor of two provinces while under the Spanish dominion, and having had a principal part in shaking off the yoke, his powers were continued, while those inherent on the Sovereign devolved on the States General. Thus the States General have the power of peace and war, alliances, raising and coining monies: but the Prince of Orange has the command of the land and sea forces as Captain general and admiral. The disposition of military commands, power of pardoning penalties, chusing magistrates on the nominations of the towns who name three out of which he appoints one. He represents the dignity, not the sovereignty, of the states, by guards and attendance of military men,and by application of all foreign ministers: because these things he did while Governor. 1. Temple's *works*. 20-43.

750. *There are certain articles in the constitution of the* HELVETIC BODY *also worthy of attention in constituting an* AMERICAN CONGRESS.

A general diet of the *13* cantons usually meets once a year, at the feast of St. John the Baptist., their office is to examine accounts, to hear appeals from the several cantons both in civil and criminal causes, to enquire into the conduct of governors, to compose differences that arise among the cantons or their allies, and to consider of measures proper to the good of the whole Helvetic body. The Diet consists of two deputies from each canton, who take their places according to the rank of the canton they represent. The deputy of Zurich alwais presides at the diets, proposes the matters to de debated, collects the votes. This canton convokes the diets by writing circular letters to the cantons, to acquaint them with the reasons of calling them together, and to desire them to send their deputies instructed upon the points therein mentioned. Besides the ordinary annual meeting, each canton has the liberty of summoning one extraordinarily whenever its finds occasion, as may the minister of any foreign prince, provided he defray the expences of it.

The terms of the Helvetic Union by their league of 1481, are that their alliance be only defensive; that the cause of proceeding to war be first laid before the cantons, who are to judge if there be cause to send deputies to accommodate the matter with the offending party; and if that fails, they are to assist the injured canton with their utmost forces, at the expence of the respective cantons: if any seige be undertaken for a particular canton, that canton defrays the extraordinary charge; but if it be for the whole, each canton pays it's proportion. No canton is obliged on any pretence to march it's forces out of Switzerland. If any difference arises between two cantons, each party chuses two judges who are sworn to judge impartially; and if they cannot agree, a fifth judge is chosen. The definitive sentence is carried into execution by the power of all the cantons. The observance of this league is sworn to every 5 years, or 10 years at farthest. *Acct. of Switzerland* by Stanyan (1).

751. Sr. Wm. Temple is of opinion that the provinces of GRONINGEN, WEST FRIESLAND and OVERYSSEL (which are three of the seven united states) lying north of the Zuyder sea and the river Yssel the northernmost mouth of the Rhine, together with WESTPHALIA a circle of Germany lying between Groningen and the river Weser, - were the antient seats of the Frisons, who under the name of Saxons came over to Britain. This includes all the country from the Yssel and Rhine to the Weser. He does not give us his reasons, but sais the Bp. of Munster gave him certain evidences of it. Temple's *Observñs on the Netherlands c.* 2. (2). Cambden going more at large into the enquiry observes that the appellations of SAXONS and ANGLES and ANGLO-SAXONS afterwards were general terms including the SAXONS, properly so called, the JUTES, and the ANGLES. Speaking of the Saxons in general he sais « *amplectar tamen illam Germanorum eruditissimorum, qui Saxones a* SACIS *praestantissimo Asiæ populo ortos., et sic dictos quasi* SACASONES, *i. e. Sacanum filii, et e Scythia, sive Sarmatia Asiatica, cum Getis, Suevis, Dacis, et aliis paulatim se in Europam effudisse, opinantur* ». The SAXONS properly so called, when first known to history, inhabited what is now called HOLSTEIN a part of CIMBRIC CHERSONESUS (now belonging to Germany, but formerly to DENMARK). Ptolemy, who is the first that mentions them, places them there. It was from this Cimbric Chersonesus that they infested the British coast while the Roman power prevailed in Britain. Afterwards they descended across the Elbe, and settled, a part of them in the country of SUEVI (now LOWER SAXONY) which included the electorate of HANOVER part of them in FRIESLAND (EAST and WEST) and part of them in BATAVIA, (supposed to have extended from the MAES to the YSSEL) (so that they inhabited all the coast from the MAES to the BALTIC. From this coast they continued to infest Britain till Hengist came over from Batavia where he had built the castle of Leyden. The JUTES inhabited the upper part of the Cimbric Chersonesus now called JUTLAND. The ANGLES according to Bedes inhabited « *inter provincias* IUTARUM et SAXONUM », that is between Jutland and Holstein which space is now the Dutchy of SLESWICK, a part of DENMARK. Ethelwerd who wrote about the year 950, sais « ANGLIA VETUS *sita est inter Saxones et Gislos, habens oppidum capitale, quod sermone Saxonico* SLESWIC, *secundum vero Danos Haithby* ». Cambden, *Britann. Anglo-Saxones* (1). So that upon the whole he makes the Anglo-Saxons, our ancestors to have possessed JUTLAND and SLESWICK, in Denmark; the dutchy of HOLSTEIN, (subject to the Duke of Holstein-Gottorp and part. to the king of Denmark) the bishopric of BREMEN (subject to the elector of Hanover) both of which are in the circle of Lower Saxony, a part of the empire : the county of OLDENBURG (subject to the king of Denmark) and the county of EMDEM or EAST-FRIES-LAND (subject to the king of Prussia) which counties are a part of the circle of WESTPHALIA, in the empire also; and the provinces of WEST-FRIESLAND and HOLLAND (two of the seven united provinces) or in other words, they possessed all the countries on the sea-coast from the NORTHEN POINT OF

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(1) Abraham STANYAN. *An account of Switzerland written in the year* 1714. London, 1714

(2) William TEMPLE, *Observations upon the United Provinces of the Netherland.* London 1672. Collective works, 1700, 1709. 1720, etc.

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(1) William CAMDEM, *Britannia*, 1586, etc.

JUTLAND to the RHINE, where it forms a common mouth with the MAESE. Langhorn sais « *Angli*, *quo tempore Tacitus an Ptolemaeus scripserint*, *illam Germaniæ partem Albi fluvio* (the Elbe) *adjacentem*, *ubi nunc est ducatus Lunaeburgensis*, *habitarunt* ». These he sais in the time of Tacitus and Ptolemy « *mediterranei fuere* » and were called SUEVI-ANGLI; but when they invaded Britain they had become « maritimi » and were called ANGLI-SAXONICI. He quotes from Sheringham this fact « *Anglos hosce mediterraneos sedes mutasse*, *atque in Jutiam australem quæ nunc ducatus est* « SLESVICENSIS » He proves that when Ptolemy wrote the Angles then called the Angli-Suevici were not possessed of Chersonesus, because that author in his description of that country does not mention the Angles, but on the contrary sais it was inhabited by the Chali, Cobandi, Sabalingii and Sigulones. So that they must have left their inland habitations and taken possession of Jutland not long before their expeditions to Britain, where they were called Angli-Saxonici. The occasion of this and their union with the Saxons he thus relates. ». Saxonum *prima in Germania sedes fuit Holsatia* (Holstein) *inde Germanicé* OLT SAREN *id est Vetus Saxonia dicta*, *unde per* VAGRIAM ( ) STERMARIAM (now Stormaria) DITHMARSIAMQUE (now Ditmarsh and both part of the dutchy of Holstein of the circle of Lower Saxony, subject to Denmark) *se diffuderunt. Hinc viribus animisq. aucti* JUTIAM *et maritima Germaniæ*, *Britanniam respicientia*, *sibi parere coegerunt* ; *Galliæ*, *Belgicæ et Armoricæ littora ferè perpetùs infesterunt*, *aliquando et insederunt. Unde totus ille tractus maritimus a* LIGERI (the Loire) *ad* ALBIM (the Elbe) *usque* SAXONICUM LITTUS *appellatur.* CHAMARI *sese iis adjungentes*, *exinde pars eorum habiti sunt*, *qui* BATAVIAM, *pulsis inde Francis Saliis*, *occuparunt. Interim atrocissime iis de Jutiæ ditione cum Danis bella intercesserunt* : *quæ cum minus properè* SAXONIBUS *cederent*, *illi* SUEVOS ANGLOS *in auxilium advocarunt*; *quorum ope recuperatam* JUTIAM AUSTRALEM (Sleswic now) *ipsis habitandam tradiderunt* *deinde* JUTIAM AQUITONAREM (now Jutland) *invadentes, eam, Danis ereptam, sui juris fecerunt. Ex illo tempore* ANGLI *unam cum* SAXONIBUS *rempublicam constituentes iis non Suevis accensiti atque* ANGLISAXONES *et uno vocabulo* ANGLOSAXONES *nominati sunt. Hic* SAXONUM, ANGLORUM *et* JUTARUM *status fuit, quum a Britannis accerserentur.* » Langhornii *Antiquitates Albionenses* (1). 329-343, so that he makes our ancestors to have inhabited JUTLAND, SLESWICK, HOLSTEIN, and the SEA COASTS of GERMANY OPPOSITE TO BRITAIN, excepting only BATAVIA of which he sais the CHAMARI, by Zosimus called the QUADI having joined themselves to the SAXONS, possessed themselves. So that he differs from Cambden only by excluding the provinces south of the YSSEL, and from Sir W^m^ Temple by including DENMARK. Mallet from Gibson's Saxon chronicle informs us that « those people who went over and settled in Britain, were originally of three different countries (2). One party of them were the antient SAXONS, that is to say, the people of LOWER SAXONY; another were the ANGLES or English who inhabited that part of the dutchy of SLESWIC in the neighborhood of Flensbourg, still called ANGELEN, and were consequently Danes. Lastly there passed over into Britain also a considerable number of JUTES, which is the name given at this day to the inhabitants of JUTLAND. Thus altho' this people were not yet known by the name of Danes, it is evident that at least two thirds of the conquerors of Great Britain came from Denmark : so that when the Danes again infested England three or four hundred years after, and finally conquered it toward the latter end of the tenth century, they waged war with the descendants of their own ancestors ». 1. Mallet's *antiquities*, c. *10* (3). This author does not seem to have gone minutely into the subject. Guthrie places the Jutes in Jutland and the ANGLES in SLESWIC, then called ANGLEN. The SAXONS he sais formerly lived between the rivers AMASIS (Ems) and EIDORE (Eyder) which take in HOLSTEIN, BREMEN, OLDENBURG, and EAST FRIEDLAND. Afterwards moving Southward they possessed all the territory between the Rhine and the Elbe, the German ocean being their borders on the West, and the borders of Thuringen on the East. Guthr. *Hist. Engl.* B. 2(1). Hume sais the Saxons inhabited from the mouth of the Rhine to the Northern parts of the Cimbrian Chersonesus. Hume's *Hist. Engl*. c. 1. Ethelwerd sais the Saxons lived « *in tota maritima a Rheno fiuvio usque in Doniam urbem, quæ nunc vulgo* DANMARC *nuncnpalur*. Ethelwerd. L. 1. ann. 449. So that upon the whole we may conclude from the suffrages of Cambden, Bede, Ethelwerd, Langhorn, Gibson, Mallet, Guthrie, and Hume that the three peoples who went over to Britain possessed the sea-coast of Europe as far Northward as the North of Denmark (nobody seeming to think otherwise but Sr. Wm Temple) and from the suffrages of Sr. Wm Temple, Langhorn, Guthrie, Hume, and Ethelwerd that they possessed as far South as the Yssel, nobody opposing it but Camden who makes them inhabit Batavia also. But this opinion is well enough accounted for by the fact Langhorn mentions, that a people called the Chamari or Quadi, who had united themselves to the Saxons, were those who took possession of Batavia and drove the Franks from thence. Our ancestors possessed therefore as follows.

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(1) Daniel LANGHORN, *Elenchus Antiquitatum Albionensium*, 1674.

(2) Tha com tha menn of thrim maethum Germanie : of Gald-Seaxum, of Anglum of Jotum. Chron. Sax. an. 449, *Note of Jefferson.*

(3) Paul Henry MALLET, *Introduction à l'histoire de Danemark...* Co-

the JUTES	JUTLAND	DENMARK	subject to the king of Denmark
the ANGLES	SLESWIC		

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penhagen, 1755-56. Translated under the title of *Northern Antiquities* London, 1770.

(1) William GUTHRIE, *A History of England from the invasion of Julius Cæsar to* 1688. London 1744-51, 4 vols.

the SAXONS	HOLSTEIN	in the circle of Lower-Saxony	GERMANY	subject part to Denmark part to Duke of Holstein Gottorp
»	BREMEN			subject to the Elector of Hanover
»	OLDENBURG	in the circle of West-phalia		subject of Denmark
»	EAST FRIESLAND			subject of K. of Prussia
»	GRONINGEN	UNITED PROVINCES		subject to the States General
»	WEST-FRIESLAND			
»	OVER-YSSEL			

752. Lord Coke sais that by force of the oath of a privy-counsellor and by the custom of the realm, he is a privy counsellor, without any patent or grant, during the life of the king that maketh choice of him. *4. Inst. 54.*

753. By the opinion of the chief justice the stat. of England shall bind those of Ireland, which was in a manner agreed by the other justices and yet it was denied the last day before, tamen nota that Ireland is a realm of itself and has a parl. in itself. *1. H. 7. 3. Bri. parl. 90.* The parl. of England does not bind Ireland as to it's lands, for they have a parl. there : but they may bind them as to things transitory as to ship wool or merchandise to the intent to carry it to any other place beyond sea than to Callice *et hujusmodi* for they are subjects of the kings, and *eadem lex* of the men of Callice and they are obedient to the admiral of England *de re super mare* and the king by license may dispense with the penalty of this statute by a clause of nonobstante, as in other patents *per eo quod* express mention etc. Et *admittetur ibidem* that to ship with intent to carry to Holland beyond sea is a cause of forfeiture immediately. *2. K. 11. Bri. parl. 98.* General statutes do not bind lands in antient demesne, nor counties palatine, nor the cinque ports, and the reason is that men of those places do not come to parl. as knights and burgesses. *22.* ass. *p. 45. Bri. parl. 99.* It is often found that Wales in the counties palatine which do not come to parl. shall not be bound by the parl. of England, for antient demesne is a good plea in an action of waste given by a stat., and yet antient demesne is not excepted. But several instances produced where they shall be bound if particularly mentioned. *8. H. 6. 34. Bro. parl. 101.* By three judges against one where a deed bears date at a place where the king's writ doth not run it shall be tried where the writ is brought by the sta. *9. E. 3.* But of all other things triable in a county palatine the court here writes to them to try it by the Com. law, and all things in Wales shall be tried in the county next adjoining by a particular statute, a distinction taken between Wales and Callice which were ? never derived from the crown (the former having been a kingdom of itself) and the counties palatine of Chester, Durham and Lancaster which were once a part of the kingdom and were derived from the crown. *Bro. abr. Cinke ports. 8. 10. 12.* The Cinque ports are not by the king's grant nor by prescription but by act in an ancient parl. *ib. 23.* The king's writ does not run to the Cinque ports, *ib, 4. 7.*

754. All Europe was beholden to the Northern nations for introducing or restoring a constitution of government far excelling all others that we know in the world. It is to the antient inhabitants of these countries, with other neighboring provinces that we owe the original of parliaments, formerly so common, but lost within this last age in all kingdoms but those of Poland, Great Britain and Ireland. Denmark was till 1660, governed by a king chosen by the people of all sorts : even the boors had their voices, which king Waldemar the third acknoleged in that memorable answer of his to the pope's nuncio, who pretended to a great power over him : « *Naturam habemus a deo* ; *Regnum a subditis*, *Divitias a parentibus*, *Religionem a Romana ecclesia* ; *quam si nobis invides*, *renunciamus per præsentes* » The estates of the realm being convened to that intent were to elect for their prince such a person as to them appeared personable, valiant, just, merciful, affable, a maintainer of the laws, a lover of the people, prudent and adorned with all other virtues fit for government, and requisite for the great trust reposed in him; yet with due regard had to the family of the preceding kings. If within that line they found a person thus qualified, or esteemed to be so, they thought it but a peice of just gratitude to prefer him before any other to this high dignity ; and were pleased when they had reason to chuse the eldest son of their former king, rather than any of the younger, as well because they had regard to priority of birth, when all other virtues were equal, as because the greatness of his patronal estate might put him above the reach of temptations to be covetous or dishonest and enable him in some degree to support the dignity of his office. But if after such a choice they found themselves mistaken, and that they had advanced a cruel, vitious, tyrannical, covetous, or wasteful person, they frequently deposed him, often times banished, sometimes destroyed him ; and this either formally by making him answer before the representative body of the people ; or if by ill practices, such as making of parties, levying of soldiers, contracting of alliances to support himself in opposition to the people's rights, he was grown too powerful to be legally contended with, they dispatched him, without any more ceremony, the best way they could and elected presently a better man in his room, sometimes the next of kin to him, sometimes the valiant man that had exposed himself so far as to undertake the expulsion or the killing of the tyrant; at other times a private person of good reputation who possibly least dreamt of such an advancement. Molesw' *Account of Denmark*. c. *4*.

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(1) Robert Molesworth, *An account of Denmark as it was in the year* 1692, London, 1694.

This was the antient and is the present constitution of Sweden, as it is also of Poland, in some measure : and it may certainly be deemed the present constitution of Great Britain. Acts of parl. have indeed been passed for settling the succession ; but they are void in their nature ; because a king, *elected by the people*, is one of the branches to whom the people have deputed the power of making laws ; and they have never bound themselves to submit to any laws but such as have received the approbation of the Commons, the Lords, and a king so elected, andhis being merely a delegated power, cannot be deputed to others by the whole delegates, much less by two branches of them only, to wit, the Lords and Commons. Locke. *Gov. 2. 11.* The following instances of the right of electing a king by the people of England prove such a right reserved to them :

640. Ercombert succeeded Eadbald his father in the kdom of Kent to the exclusion of Erminfrid his elder brother.

673. Lothaire brother of Egbert the late king of Kent was placed on the throne to the exclusion of Edric his son.

684. Edric slew Lothaire and became king to the exclusion of Richard, son of Lothaire.

Ceorl a kinsman of Wilba, last king of Mercia, was made king, and excluded Penda, the son of Wibba.

672. Sexburga, widow of Kenwalch K. of Wesex was continued in the government till her death, tho' there were relations.

726. Adelard, brother to Ethelburga wife of Ina k. of Wessex, succeeded to the throne (to which he was called by the will of Ina) to the exclusion of Cuthburga and Quenburga sisters of Ina and of Oswald who was of the royal family.

Cenulph was elected by the people of Wessex, they having first dethroned and expelled Sigebert for mal-administration.

784. Brithric a remote descendant of the royal family was preferred to Egbert the great grandson of Ina by his brother Ingild. Innumerable other instances might be produced from the history of Heptarchy, but I will pass on to times after the Union.

925. Athelstan, natural son of Edward the elder, succeeded to the exclusion of Edward's legitimate children who were younger.

946. Edred, brother of Edmund, succeeded in preference to the son of Edmund.

955. Edwy, son of Edmund, succeeded again setting aside the sons of Edred the last king.

1017. Canute the Dane became king on the death of Edmund ironside, the Saxon line being set aside.

1035. Harold, 2d son of Canute, succeeded in preference to Sweyn his elder son, king of Norway.

1039. Hardicanute, 3d son of Canute, succeeded to the exclusion of the same Sweyn.

1041. Edward (the confessor) son of Ethelred by a second marriage, was advanced to the throne in preference to the same Sweyn, and also to the descendants of Edmond ironside who was a son of Ethelred by his first marriage.

1066. Harold succeeded Edward the confessor by universal consent, excluding Edward Athgling son of Edward who was son of Edmond ironside elder brother of Edward the confessor. From these instances it appears the crown of England was neither hereditary nor testamentary, tho' both of these circumstances gave weight in the election of a successor.

1066. Wm. the Norman excluded Edgar Atheling.

1086. William Rufus, second son of William the Norman, succeeded to the exclusion of Robert the eldest son.

1100. Henry I succeeded William II in exclusion of the same Robert. Stephen, son of Adela, who was a daughter of William the Norman (by Stephen count of Blois succeeded Henry in preference to Mathilda Henry's daūr (married to the Emperor of Germany).

1154. Henry the 2^d son of Mathilda succeeded to Stephen in preference to William son of Stephen.

1326. Edward III, called to the throne in the room of his father Edward II who was deposed.

1399. Henry IV (Bolingbroke) Duke of Lancaster, placed on the throne instead of Richard II, deposed, and in preference to the house of York who were descended from Lionel Duke of Clarence 2^d son of Edward III while the house of Lancaster was descended from John E. of Gaunt 3^d son of Edward III. The crown was continued in the line of Lancaster thro' 3 successive reigns, to wit. Henry IV, Henry V, Henry VI, when it was given to.

1461. Edward IV, of the house of York.

1483. Richard III (D. of Gloster) was elected in the room of Edward V deposed. Richard was of the family of York, but not heir.

1485. Henry VII (E. of Richmond) came next to the throne, and was descended from John of Guant D. of Lancaster who during the life of his 2^d wife lived in adultery with Catherine Swineford, by whom he had issue John Beaufort E. of Somerset, who had a son John D. of Somerset, who had a daũr Margaret intermarried with Edward Tudor E. of Richmond, by whom she had H. VII, so that he was of the house of Lancaster, which was a junior house, and was of an illegitimate branch of that house. Moreover his mother was still living and stood before him if regular succession had been regarded, but he mended his title by marrying Elizabeth eldest daũr of E. IV and heir to the crown.

1688. Mary, eldest daũr of James II, with her consort William Henry Nassau prince of Orange called to the throne in the room of her father who was deposed.

1695. William III on the death of Mary continued on the throne in preference to James II then living and also to the lady Anne, 2^d daũr of James II.

1702. Anne succeeded to the prejudice of her brother.

1714. George I, son of Ernest Augustus, elector of

Brunswick by Sophia grand daũr of James I, succeeded to the exclusion of the male descendants of James II

1727. George II, succeeded in like manner.

1760. George III, in like manner.

That acts limiting the succession to the crown are of little consequence appears by the succession of James I to the exclusion of the descendants of lady Jane Grey who on failure of issue of Henry VIII, was by his will called to the crown (she being daũr of his 2^d^ sister, while the elder sister had married the king of Scots and left issue James I.) he having a power of limiting the succession as he pleased by an act of parl. Yet Jac. I. succeeded without any opposition of note, cont^d^ inter. *755-756* (*See p. 225*).

755. At the middle of the 14th century the crown of Sweden was still elective, Vertot *Revolñ de Suede.* (1) And tho' the children and nearest relations of the king generally succeeded, yet (p. 1), it was without regard to order of birth, and alwais by virtue of an election. The king could neither make peace or war, and still less raise troops or money (p. 2) without consent of the Senate. He could not build new fortresses nor commit the charge of the old but to the natives of Sweden, nor could he introduce foreign troops into the kingdom. The revenues of the crown (p. 3) consisted in it's demesnes, to which antiently were added fines and amercements, but these were now usurped by the clergy. The fiefs and commands of the castles, at first given for life, were now become hereditary, the king was nothing more (p. 4) than the president of the Senate in time of peace, and Captain general in time of war. The SENATE possessed almost the whole authority. It consisted (p.5) generally of the 12 Lords of provinces or who had the first charges of the state. They met the king at Stockholm when any affair of importance happened. Their dignity was not hereditary but of the king's appointment (but (p. 5.) when appointed they seem to have been in for life). The Archbishop of Upsal was a senator of course, and administrator of the government during an interregnum. In the senate resided the omnipotence and majesty of the state (p. 6). It was the dernier resort of justice, and decided of war and peace jointly with the king who executed their resolutions. The clergy possessed more wealth than the king and all the other states of the realm together. The archbishop of Upsal and the six bishops were in fact petty sovereigns. (p. 8). They fortified their castles, kept garrisons there, and never marched but accompagnied with a military force. The Lords had no titles, but were distinguished (p. 9) by their wealth alone. The Bourgeois who subsisted by commerce were disposed (p. 10) to submit more implicitly to the king. They sent deputies to the diets, the Peasants who also sent deputies to the diet formed the most powerful body of the state. They generally were much influenced by their Lords in the choice of their deputies. Margaret the daughter of Valdemar king of Denmark, (17) and widow of Haquin king of Norway was elected to the Sovereignty of Norway on the deaths of her husband and her son in 1374. In the same year her father dying, she (18) was elected queen of Denmark. She was called the Semiramis of the North (21). In 1374 she was elected queen of Sweden in the room of Albert deposed, by which means the three northern crown became united(24). The form of Government being nearly alike in these three states, wiz. they were all elective, each had it's senate, and the prince could not without consent of the States general undertake any affair of importance. She convoked the states general of the three kingdoms at Calmar in Sweden to pass a fundamental law of Union of the three kingdoms under the same monarch. 40 de-

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(1) RENÉ AUBERT de VERTOT, *Histoire des Révolutions de Suède, où l'on voit les changements qui sont arrivés dans le Royaume au sujet de la Religion et du Gouvernement*, Paris, 1768.

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(1) Volt., *Char. XII. Book* 2, *Note of Jefferson.*

puties came from each. This law called the union of Calmar, consisted in three articles. 1. That these kingdoms should have the same king to be chosen by them by turns. 2. That the sovereign should divide his residence between the three kingdoms and expend in each it's proper revenue. 3. Each kingdom should preserve it's senate, laws, customs, and privileges, and that the governors, magistrates, generals, bishops, troops and garrisons should be taken from each country for the use of that country, without introducing in either the subjects of the others, who were to be looked on as aliens in the government of states where they were not born. In *1439* however the Swedes (having been ill treated by Margaret and by Eric her successor) renounced their subjection to Eric, and chose Charles Canutson their king (45). After his death in 1469 they discontinued the kingly office and chose a person whom they called an Administrator who in fact possessed equal power with the king. This however brought in the state continual wars on the part of Denmark whose sovereigns under the Union of Calmar pretended of course to be entitled to the sovereignty of Norway and Sweden. In the former they prevailed but in the latter they were successfully opposed by the Administrators (58) till the reign of Cristiern II of Denmark the most detestable master that ever disgraced the human form. By various treacheries he found means to subdue the whole of Sweden, but Gustavus Ericson the most distinguished hero that ever lived found means at length to rescue his country from Danish domination and establish it in independance. In 1521, he was offered the crown (having then made good progress in recovering the territories from Denmark) (239) but declined it and was appointed administrator, but in 1523 having now completed the expulsion of the Danes, the office of Administrator (which had continued 55 years) was abolished and he was elected king, and the States in the overflowings (268) of their affection to him and aversion to the new king of Denmark Frederick Duke of Holstein (Christiern being deposed in Denmarck) passed (278) an act by which they obliged themselves to approve whatever Gustavus should undertake for the preservation of his dignity, without requiring that he should convoke the States, whether he should want to make war or peace ; and declared that his enemies should be reputed the enemies of the state. This was in effect transferring to the prince absolute power. His next aim was to reduce the power and wealth (333) of the clergy and tranfer it to the crown; in order to do this he introduced the Lutheran religion instead of the Roman Catholic. The minds of the poeple being thus alienated from the church of Rome rendered the resumption of it's (376) possessions less dangerous ; tho' some commotions resulted from it, which were easily suppressed. He next compelled the nobility to pay rents for the fiefs of the crown which they had contrived to render hereditary and the rents of which they had long witheld under favor of the civil wars which had torn the kingdom for some time. By these means he put the crown on a respectable and independant footing, and last of all he (412) procured a solemn act of the states in 1512, by which the right of electing a king was given up, and the crown made hereditary in his family. He died in 1560. Vertot. *Revolñs de Suede.* pa. — to the end. This hereditary descent however was set aside in the very first instance, for Eric, eldest son of Gustavus after a short reign of nine years was set aside for mal-administration (on pretense of *insanity* tho' it might better have been called *ill temper* (1), and John the second son of Gustavus placed on the throne. Again Sigismund having succeeded his father John, and been also elected king of Poland, was dethroned and his descendants set aside by a solemn act in 1604, and Charles IX youngest son of Gustavus Ericson and uncle of Sigismund was elected king. Peleus *hist. derniere*

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1) The words in parenthesis are crossed out in the mss.

guerre de Suede. 92. Charles was succeeded in 1611 by his son Gustavus Adolphus, and he again in 1633 by his daughter Christinia. She resigning the crown in 1654, Charles Gustavus fourth son of Catharina who was sister to Gustavus Adolphus, was called to the crown. So that the succession was again broken and carried into a new line of the family, in which it continued three generations to wit. Charles Gustavus, who was succeeded in *1660*, by his son Charles XI, the king was rendered entirely despotick. The Senate was laid aside, the States general declared the king accountable for his actions to none but god, that he was not bound up to the laws then in being but might alter & add thereto as he thought proper. They imposed large taxes and recommended to his majesty to make such establishments of forces by sea and land and fortified places as should appear needful. The heavy taxes on the nobility having reduced them to poverty, they could no longer subsist without emploiments at court. They therefore became the creatures of the crown. The officers of the army sitting in the same house ensured the king's influence there, the clergy burghers and commonalty having been much oppressed by the nobility, thought they could never trust the king too much, more especially when they considered his services in rescuing the kingdom from the distressed state in which he found it. Thus every body of the state were disposed to comply with all the requisitions of the king, and to pass the several acts which rendered him as despotic a sovereign as any in Europe. The diet or assembly of the states was by this means rendered of no other use but to record the acts of the king. Charles XII exercised this absolute authority with a very high hand ; yet had his successes rendered him too popular, and his vigilance and activity too formidable to attempt any thing against him. But on his death in 1718 the states resumed the right of electing their sovereign, passing by Charles Frederick grandson of Charles XI, by his eldest daũr., and advanced to the crown Ulrica Eleonora youngest daûr of Charles XI, married to the prince of Hesse-Cassel. She not only consented that the states should resume their antient powers, but that they should establish new powers in favor of the people, such at least as they had lost for above 200 years. She was restrained from pardoning criminals but in certain cases, and from alienating any of the possessions of the crown in favor of younger children.

The education of her heirs to be under the direction of the states and none to succeed till they are 21 years of age, renounce absolute power, and acknolege they hold their crown from the states. No laws to have force without the consent of the states, nor any taxes to be laid, or war, peace, or alliances made without the same consent of the estates. She was allowed to coin money, but not to mix any alloy, nor alter it's value. She was not to go out of the kingdom without their consent. 24 Senators were to be chosen by committee of the nobility, clergy and burghers, who had a right to advise her, and also to administer the government during her absence or indisposition and during a vacancy of the throne, and were expressely declared responsible to the states for their conduct. No gentleman could be condemned but by a court of (1) The queen could take no money from the treasury without consent of the states or senate. The forces were to swear allegiance to the queen, kingdom and states ; no officer to march any soldier out of their quarters, without leave from the states or senate on pain of death. The states to dispose of all military offices above a lieutenant colonel, and no place in the government to be given without the consent of the senate, and she was to summon the states once in three years or oftener if the public welfare require it. These were the principal pacta conventa which the Swedes made with their new sovereign. In 1721 she resigned the crown on assurance that they would confer it on her husband which they accordingly did. The peasants were the least gainers by these restrictions on the crown, because their body sent no deputies to the secret Committee nor have any vote in the election of a Senator. This however they complain of as a great grievance. In 1736 the king on account of ill state of health resigned the government in favor of the queen, which was approved by the Senate and the queen dying soon after, it was restored to the king. In 1742 the Duke of Holstein Eutin was declared successor in case of the death of the king. CONSTITUTION. The Senate in fact possesses the executive power. They are at present reduced to the number of fourteen, who are chosen as follows: 24 of the body of nobility, 12 of the clergy, and of the house of Burghers being assembled take an oath of secrecy after which they chuse three persons (in which they must be unanimous) to succeed in case of a vacancy. Of these the king appoints one whenever a vacancy happens, there cannot be more than two of the same family in the senate at one time. The house of Commons have no vote in electing a senator. A senator presides in every one of the superior courts of justice, to whom is added a vice president and four associates. The President of the court of Chancery and two or three other with the Chancellor and the king if he pleases are a Court of Revision to which the subject may appeal from any other civil court. In their inferior courts they have a standing jury for the trial of all matters of fact, but they can try nothing of greater consequence than forty shillings. These courts are ambulatory and held in the neighborhood where the facts arise. Facts committed at sea are tried in the ordinary courts but by the marine laws, to wit the laws of Wisby, they have their Ecclesiastical causes in which a bishop is president. But there is an appeal to the national court. In criminal matters where there is a defect of evidence they allow purgation by oath of the party with 6 or 12 compurgators. Trials by jury of 12 men are as antient as any part of their constitution, tho' now only practised in inferior courts. Their jurors are for life and have salaries settled on them. They must be unanimous in their verdict. In the superior courts every thing is determined by a majority of the judges on the bench. The punishment of theft is perpetual slavery. The criminal wears an iron collar from which there comes a bow over his head with a little bell that rings on the least motion. Their religion is Lutheran, nor will they tolerate a profession of any other. There are four estates. 1. The nobility, 2. The clergy, 3. The burgesses, 4. The Commonalty. They are chosen as follows : 1. one out of every family of the nobility and gentry, which were about 2000 is chosen to represent that body, and with them the Colonels, Lieut^{t}-colonels majors, and captains of every regiment sit and vote. 2. The clergy chuse one out of every rural deanry consisting of 10 parishes, who with the bishop and superintendants make about 200 and represent that body. 3. The magistrates and common council of every corporation chuse representatives of the burghers, and of these there are about 150. The peasants or commonalty chuse one out of every district to represent them ; and of these there are about 250. They meet the king at Stockholm, where the business of assembling is opened to them by the Secretary in the presence of the king. Then they retire into four separate chambers, and chuse the secret Committee, before whom all publick papers and transactions since the dissolution of the last diet are laid by the king and his ministers, however secret in their nature. They prepare matters to enable the States to pass judgment on the conduct of the Senate and give advice in regard to the future. In each chamber a majority of votes determine, but all the chambers must concur in any act. Their militia is pretty much on their antient feudal footing (1) : every farm of 60 or 70 £ a year maintains one foot soldier. They give him his diet, lodging and ordinary clothes, and about 20/a year in money, or else a little wooden house is built for him by the farmer who allows him hay and pasturage sufficient to keep a cow and ploughs and sows land enough to supply him with bread which the married soldiers usually prefer to being quartered on the farmer. Whenever the soldier dies or is disabled the farmer is to procure another. The officers are maintained out of crown lands. Every officer has a house and land assigned him and the rent of other farms to the value of his pay: a colonel 300 £ per ann. The houses and lands are visited every year by commissions. No officer is advanced till he has made his former estates as good as he found it. The soldiery is subject to the civil magistrate while in quarters, but when called out to actual service they are under military discipline. Every company assembles to perform their exercise once a month, and every regiment twice a year. Besides these there are farms for the support of superannuated officers and of hospitals for old and maimed soldiers. Salm'. *Mod. hist. til. Sweden* (1).

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(1) Volt., *Char.XII. B.* 5., *Note of Jefferson.*

754. Contind. Frequent meetings of the estates was a part of the very fundamental constitution of Denmark. In these all matters relating to good government were transacted, laws enacted, peace, war alliances, disposed of, great offices, marriages of the royal family etc., were debated. Taxes and benevolences were purely accidental, no constant tribute being paid nor money levied on the people, unless to maintain a necessary war with the advice of the nation, or now and then a free gift towards a daũr's portion. The kings ordinary revenue consisted in his lands, on which he lived like one of our modern noblemen. This form of government continued till 1660, when in one instant the whole face of affairs was changed, the kings rendered perfectly absolute, and not the smallest remnant of liberty left to the subject. It happened thus: The nation was at that time reduced very low by the last wars with the Swedes, the army not disbanded, nor money to discharge the arrears due to them in order to disband them. The states were called at Copenhagen, to wit. the Nobility, the Commonalty, and the Clergy. The Nobility were for maintaining and even extending their antient prerogative of paying nothing by way of tax, but only voluntary contribution; on the other hand the Clergy for their late adherence to the interests of their country and the Burghers for their vigourous exertions, thought themselves entitled to some new merit of the state, and that, the sums of money necessary should be levied proportionably, the nobility, who enjoyed all the lands, paying their share of the taxes. The dispute growing very warm, the Commons and Clergy went in a body to the palace and presented the king with the absolute and hereditary dominion of their state, which with the Nobles were obliged to concur. Thus was the kingdom of Denmark changed from an estate little differing from an Aristocracy into an absolute monarchy in four days time, without the smallest attempt at opposition, and at this time (1692) all meetings of the estates in parliament are entirely abolished; and the very name of estates and liberty as much forgotten as if there never had been any such thing among them. L^d Molesw.' *Accl. Denm. c. 6. 7.* The laws of Denmark for justice, brevity, and perspicuity are excellent. They are grounded on equity, are contained in one quarto volume, and written with so much plainness, that any man who can write and read may presently understand his own case and plead it without the help of counsel. ibid. c. 15. *Corruptissima republica plurimæ leges.* Tacit. *Ann. lib.* 3.

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(1) Thomas Salmon, *Modern History, or the Present State of all Nations*, 3 vols. London, 1739. 3^{rd} ed., 3 vols. 1744-46.

756. In Poland the legislative authority is in 1. the king, 2. the Senate, 3. the representatives of the nobles and gentry. On the death of a king the archbishop of Gresna, who is primate of the K'dõm, is inter-rex. He assembles the nobility at Warsaw to elect a new king.

They meet on horseback in the open field, but the Senators are in a boarded room erected for them, then they depute a certain number of Senators and other noblemen to enquire into the incroachm̃ts or misconduct of the last king and to insert such articles in the *pacta conventa* as may restrain the successor from the like. To these *pacta conventa* the king, when elected, swears. The principle articles are that he shall not endeavor to make the crown hereditary ; that he shall not coin money ; that he shall not make war or peace, or levy soldiers, or introduce foreign troops without the consent of the republick. That he shall not diminish the treasure of the crown, or borrow money without the consent of the dyet ; that he shall bestow no office on strangers ; that he shall be of the Roman Catholic communion ; to which are usually added some occasional articles. He has the disposal of all offices and emploiments civil, military, and ecclesiastical ; but all offices are for life. He can call, provoque or dissolve the dyet when he pleases. He has a council to assist him who must be natives, and who may, perhaps must, be Senators. The Senate in conjunction with the king have the whole executive power, and in the intervals of the dyets take upon them to make acts of state which have the force of laws till repealed by the dyet. But this power is disputed by the dyet, and probably would be condemned were it not that their dyets often break up in extreme confusion without doing any thing, and induces a kind of necessity for the assuming this power. The Senate consists of the Bishops, Palatines, Castellans, and ten great officers of the crown and dutchy amounting in the whole to about 150 ; they are Senators by virtue of their offices. The Grand dyet must be assembled once in three years and their session to continue six weeks and no longer. When the dyet is to be assembled the king (having first advised with the Senate) sends circular letters to the Palatines, with the heads to be debated in the dyet, and the time and place of meeting. The Palatine communicates them to the Castellans, Starostans and other gentlemen of the Palatinate requiring them to meet in the palatinate on a certain day, to deliberate on the articles, and elect representatives for the ensuing dyet. All gentlemen who have three acres of land worth 40/a year have a vote in these lesser dyets; no senator can be elected. Every palatinate has two or three representatives. Instructions are drawn up for them, from which they cannot vary, decisions here are by plurality of voices. These representatives were first introduced into the general dyet by king Casimir the third between 1333 and 1370. The first business of the representatives is to chuse a Speaker, but till they can agree on one the last Speaker acts. All new laws have their beginning in this house. As soon as he is elected he with the other representatives attends the king in the chamber of the Senate where the Chancellor in the king's name speaks to them. Then they retire to their own house. When they have agreed on any bills they go again to the upper house where they stand uncovered behind the Senators. Not only the consent of every member of the whole diet is necessary to constitute a law, but if they all agree to 19 bills and refuse the 20th, all of them fall to the ground. While the lower house is preparing bills the Senate is emploied in trying criminal causes. Every Polish gentleman is a sovereign in his own lands, his tenants being under the jurisdiction of such officers as he appoints, and it is in but few cases that the superior courts take cognisance of any offences committed within their district. A Polish gentleman cannot be apprehended for any crime till he has first been convicted of it in the superior tribunals, and then he cannot be executed without the king's consent. They are exempt from having soldiers quartered on them, and from paying any taxes but such as are imposed by the general dyet. The common people, who are much the greater part of the nation, hold lands of the crown, clergy, or gentry by base tenures, as on condition of manuring their lord's land: others deliver a certain proportion of the profits as a rent. Every Lord has his courts where his officers administer justice, as was formerly in England, neither citizens nor husbandmen are allowed to purchase lands of inheritance but with the consent of the General dyet, which advances them to the degree of gentleman, but still they cannot enjoy any considerable post till the third generation. They have two grand generals appointed by the king for life. When the king is in the army he has the absolute command of it : but when absent his generals are not to be controuled by him nor to regard his orders. The national forces are not obliged to march beyond their frontiers, or to remain above six weeks in the field at a time. They are composed of the gentry. They have very few fortified towns, and impute the preservation of their country and liberties to the want of them. They are indeed the more subject to the incursions of their enemies, but having no places to fix themselves in, they are forced to retire as suddenly as they advanced, and they think that had their princes had strong towns in which they might have placed numerous garrisons to bridle the country, they should not have maintained their liberties till this day. Salm. *Mod. hist. article Poland. c. 5. 6.* (1).

757 (2). Property in land seems to have gone through four successive changes among the people who settled in the various provinces of the Roman empire. 1. while the barbarous remained in their own original countries they had no fixed property in land, and no certain limits to their possessions. After feeding their flocks in one district, they removed with them their wives and families to another ; & abandoned that likewise in a short time. They were not, in consequence of this imperfect species of property, brought under any position or formal obligation to serve the community ; all their services were purely voluntary ; every individual was at liberty to chuse how far he would contribute towards carrying on any military enterprise. If he followed a leader in any expedition, it was from attachment, not from a sense of obligation. 2. upon settling in the countries which they subdued, the victorious army divided the conquered lands. That portion which fell to every soldier he seized as a recompense due to his valour, as a settlement acquired by his own sword. He took possession of it as a freeman in full property. He enjoyed it during his own life, and could dispose of it at pleasure, or transmit it as an inheritance to his children. This property was Allodial i. e. the possessor had the entire right of property and dominion ; he held of no sovereign or superior lord, to whom he was bound to do homage and perform service, but as these new proprietors were in danger of being disturbed by the remainder of the antient inhabitants, or by invaders they were under a necessity of submitting to obligations to defend the community more explicit than those to which they had been subject in their original habitations. On this account immediately on fixing in their new settlements every freeman became bound to take arms in defence of the community, andif he refused was liable to a considerable penalty. This was not by any contract formally concluded but by a general tacit consent. In this state was property during the 5 th, and 6 th, centuries. 3. Property in land having thus become fixed and subject to military service another change was introduced, though slowly and step by step. Tacitus informs us that the chiefs among the Germans endeavored to attach to themselves adherents whom he calls *Comites*. These fought under their standard and followed them in all their enterprizes. The same custom continued among them in their new settlements, where they were called « *fideles* » « *anstrustiones* » « *homines in truste dominica* » et « *leudes* ». In their original settlement they had been usually courted by presents of arms and horses and by hospitality, but upon the acquisition of fixed property in the new settlements, the kings and chieftains bestowed lands on them. These grants were called « benificia » because they were gratuitous, and we may warrantably conclude that they subjected the holder to personal service and fidelity. And we find that Allodial property was frequently converted into feudal by a voluntary deed of the possessor. The motives for which were these: in those times of anarchy and disorder which became general in Europe after the death of (1) Charlemagne, when individuals were exposed to rapine and oppression, it became necessary for every man to have a powerful protector under whose banner he might range himself and obtain security against enemies whom he could not singly oppose. For this reason he relinquished his allodial independence and subjected himself to the feudal services, but the transition into all the rigors of feudal service was gradual. As protection was their sole object, when they first made themselves vassals of a powerful leader they retained as much of their antient independance as was consistent with that new relation. The homage which they did to their superior was called « *homagium planum* » and bound them to nothing more than fidelity, and not to military service or attendance in the courts of their superior. As soon as men were accustomed to these the other feudal services were gradually introduced. In some parts of Europe this change from Allodial to Feudal property became so general that he who possessed land had no longer liberty of choice left, but was obliged to recognise some leige lord and to hold him. Thus in the counties of Clermont and Beauvois if the Lord or Court discovered any lands within his jurisdiction for which

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(1) Thomas Salmon : *Modern History, or the Present State of all Nations.* London, 1739.

(2) William Robertson, *History of the Reign of the Emperor Charles V, with a view of the Progress of Society from the Subversion of the Roman Empire to the beginning of the Sixteenth Century,* London, 1769, Philadelphia, 1770, 3 vols.

(1) A. C. 814, *Note of Jefferson.*

no service was performed and which paid him no tax or customs he might instantly seize it as his own, for sais Beaumanoir according to our custom no man can hold allodial property. Upon the same principle is founded the maxim which has at length become general in France « Nulle terre sans Seigneur ». In several parts of Europe property had become almost entirely feudal by the beginning of the 10th century. In the provinces indeed of Languedoc, Roussillon and Catalonia property seems to have been Allodial during the 9th, 10th, and greater part of the 11th, centuries : and in the Low countries it continued so during the 11th, 12 th, and 13 th, and some vestiges of it remained in the 14 th century. 4. The *beneficia* (at first granted during pleasure) were granted afterwards for life ; after which they were made hereditary, first in the direct line, then in the collateral, and at last in the female line (1). Charles Martel was the first who granted them for life and (2) Louis le Debonnaire was among the first who rendered them hereditary. Robertson's *hist. Charles V.* vol. 1. pa. 213-225. con^{d} inter 758 and 759.

758. ALODE or ALLODIUM is compounded of the German particle « AN » and « LOT » i. e. land obtained by lot. Wachteri *Glossarium Germanicum voc. Allodium.* FEODUM is compounded of « od » possession or estate and « FEO » wages, pay ; intimating that it was stipendiary and granted as a recompense for service. *id. voc. feodum.* 1. Rob. *C. V. 225.*

757. *Continued.* In Italy Allodial property continued longer in Estimation, than in France It appears by charters that the emperors granted allodial rights in the 9th, century. In the 11th century we find some examples of persons who resigned their allodial property and received it back as a feudal tenure. The word « *feudum* » which came to be substituted in the place of « *beneficium* » does not occur in any charter previous to the

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(1) Inter 716 and 741. *Note of Jefferson.*

(2) Inter 814 and 840, *Note of Jefferson.*

11th century. In Germany also the progress of the feudal system was slower than in France : Conrad II, who began his reign in 1024 was the first emperor who rendered fiefs hereditary there, which was 200 years later than the introduction of that practice in France. And after the alteration by Conrad fiefs were often granted there for life; an instance occurs so late as 1376. The transmission of fiefs to collateral and female heirs took place very slowly among the Germans. There is extant a charter 1201 conveying the right of succession to females as an extraordinary mark of favor. In Germany as well as in France and Italy a considerable part of the lands continued to be allodial long after the feudal mode of tenure was introduced. A great part of the lands in the marquisate of Misnia was Allodial in the 13 th century. 1. Rob. *C. V. Note VIII.*

759. Dr. Sullivan (1) makes an arbitrary distinction between BENEFICIARY and FEUDAL possessions which is likely to confuse a reader who has been accustomed to consider them, as they really were, to be synonimous terms. By the help of this he expects to reconcile the differences between authors, some of whom ascribe the first introduction of feuds to the Lombards, and some to the Franks. Beneficiary grants (by which he means grants of lands at will, for years, or life) he sais, were common to the Franks, Burgundians, Goths and Lombards and were a part of their antient customs while they lived beyond the Rhine and indeed were common to all the different people of Germany ; so that no one of them can pretend to an earlier introduction of them than the others [yet it seems clear that such grants, and indeed that all fixed property in lands were totally unknown to the Germans when first mentioned in history. see ante 757]. But as to the law and practice of feuds when they became inheritances there can be little doubt but it was owing to the Franks. Charlemagne was the first who established among the Franks the succession of fiefs, limiting it to one descent. Whereas Conrad the second was the first who admitted them to be descendible in Germany and Italy. [*It does indeed appear that the beneficiary grants became hereditary first among the Franks, but not that they were the first who introduced them in their earlier form*]. But whether feuds were first introduced among the Lombards or the Franks, he observes it will be better for an English lawyer to investigate their formation among the latter, because from them they migrated to England. He supposes from Caesar and Tacitus that the country of the antient Germans was divided into districts one of which was allotted to each chief, who, after retaining sufficient for his own purposes distributed the rest among his followers. [*If these authors are so to be understood, the person taking the land from the chief does not appear to have owed him any services of a feudal nature ; tho' doubtless he was ready to join in defending his country in general.*] Sullivan. *Lecture 2ᵈ* (1).

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(1) FRANCIS STOUGHTON SULLIVAN, *An Historical Treatise on the Feudal Laws and the Constitution and Laws of England... In a course of lectures read in the University of Dublin*, London, 1772.

760. The persons employed in cultivating the ground in the feudal ages may be divided into three classes. 1. SERVI, or slaves. This seems to have been the most numerous class, and consisted of captives taken in war or of persons the property in whom was acquired in some of the various methods enumerated by Du Cange *voc. servus.* v. 6. p. 447. The wretched condition of this numerous set of men will appear from several circumstances. Their masters had absolute dominion over their persons ; might inflict any corporal punishment and even death : and when this dangerous jurisdiction was restrained, a slight compensation only was required for the life of a slave. Slaves were not permitted to marry. They were allowed to cohabit but this was not considered as a marriage, but only a *contubernium.* The children of slaves were in the same condition of their parents and became the property of the master. Slaves might be sold by their master ; and when afterwards they became *adscripti glebæ* they were conveyed by Sale together with the farm on which they lived. They were entitled to nothing from their master but substance and cloaths ; and if they were indulged with a *peculium*, yet what they made from it was their master's. Slaves were distinguished from free men by having their heads shaved, whereas among all the barbarous nations long hair was a mark of dignity and of freedom. Du Cange *voc. servus* Potgiesserus *de statu servorum.* Muratori *antiq. Itali.* 2. VILLANI. These were *adscripti glebæ* or *villæ* from which they derived their name. They differed from slaves in this that they paid a fixed rent for their lands, after which all the fruits of their labor belonged to themselves. Muratori *antiq. Ital.* p. 773. 3. FREE-MEN. these are distinguished by various names by the writers of the middle ages, *Arimanni*, *Conditionales*, *Originarii*, *Tributales*, etc. These held lands either *in allodio*, or for fixed rent. They enjoyed all the privileges of freedom and were even called to serve in war. Yet such was the tyranny of the great proprietors of land and so various their opportunities of oppressing those who were settled on their estates that many free men, in despair renounced their liberty and voluntarily surrendered themselves as slaves to their powerful masters, in order that their masters might be more immediately interested in their protection and might afford them subsistence for themselves and families. It was still more common to surrender their liberties to bishops and abbots that they might partake of the security which the slaves of the church (*sic*). Du Cange *voce Oblatus.* Murat. *antiq.* v. 1. 1. Rob. *C. V. note IX.*

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(1) The manuscript gives 2ⁿᵈ ; the subject referred to here is discussed in Sullivan's *third* and not *second* lecture in the edition I have consulted.

761. So ignorant were men in general after the barbarous nations had effaced the Roman knolege and civility, that many charters granted by persons of the highest rank are marked with a cross because they could not subscribe their names, even kings affix *signum manu propria pro ignoratione literarum.* Du Cange *voce crux.* From this is derived the phrase of signing instead of subscribing a paper. In the 9th century the supreme judge of the empire could not subscribe his name. In the 14th century Du Guesclin constable of France, the greatest man in the state and one of the greatest men of his age, could neither write nor read. In the 11th century the art of making paper as now used was invented. This produced the first dawning of letters and improvement in knolege which then appeared. The invention of the art of printing was in [*blank*] and ushered in the light which spread over Europe at the æra of the reformation. I. Rob. *C. V. note X.*

762. So great was the notion of particular independence among the Germans, that they thought that all of the freemen or soldiers, except the Comites who had by oath bound themselves to the person of the king for life, were at liberty to engage in expeditions that neither the king nor the majority of the nation consented to ; and that under leaders of their own chusing. For, as at their general meetings war was necessarily the most common subject of deliberation, if any one proposed an enterprize all who approved the motion were at liberty to undertake it ; and if the king declined commanding therein, they chose a general capable thereof ; and when under his conduct they had succeeded they either returned and divided the spoil, and became subjects of their former king as before ; or, if they liked the country they had subdued better, settled there and formed a new kingdom under their victorious leader Sull. *Lect. 4.*

763. Idea of the demolition of the Roman empire and establishment of the Kingdom of the Franks. About the year 200 after Christ the several nations who had eebn hitherto cooped up beyond the Rhine and the Danube and kept in some awe by the terror of the Roman name began to gather courage from the weakness of the empire, and from that time few years passed without incursions into some part of it. But these were confined to the views of rapine and plunder till an event which happened about the year 370. This was a vast irruption of the Huns and other Tartarian nations into the North of Europe. These people finding the invasion of the Persian empire which was then in it's full grandeur an enterprise too difficult, crossed the Tanais and obliged the Alans and Goths who lived about the Borysthenes and the Danube to seek new quarters. The Alans fled westward to Germany ; the Goths begged from Valens an asylum in the Eastern empire. They were accordingly permitted to settle in the countries South of the Danube which had been before almost depopulated by their ravages. This was on condition of their embracing the Christian faith. In order to melt them into one people with the Romans they were employed in their armies and many of their kings and great men were in favor at court and raised to emploiments in the state. But about the [year] 406, the Goths and Hunns, in concert, attacked the Eastern empire. In the next year Germany surcharged with inhabitants sent for her multitudes across the Rhine. The Suevians, Alans, Vandals and Burgundians laid waste all the open country of Gaul. The distressed emperor Honorius granted to the Burgundians (who had acceded to the Christian religion) the country of which they had possessed themselves, namely, Alsace and Burgundy. The Goths under Ataulphus successor of Alaric settled in the South-West of Gaul under a like grant. Thus were two kingdoms formed in the South of Gaul the new inhabitants of which coming by compact under the title of the Roman emperor behaved to the subjected Romans with moderation, indulging them with the use of the Roman laws and a considerable portion of the lands. The Franks took hostile possession of Belgic

Gaul, and all the territory from the Rhone to the mouth of the Loire northward. They treated the Roman inhabitants in the stile of masters. Many of them were reduced to slavery, and the greatest among them was no member of the political body, nor capable of the lowest office in the state. Offences committed against a Frank or other Barbarian were fined the double of those committed against a Roman or Gaul. No wonder then that the term of Gentilis Homo, formerly a term of reproach among the Romans became now a name of honour, and a mark of nobility. Clovis by uniting the Franks, subduing the Allemans and conquering considerable tracts from the Visigoths and Burgundians first formed a considerable kingdom. The Franks and some other German nations, the Aremorici, the inhabitants of Brittany, submitted to him on condition of retaining their estates and the Roman laws. The Gauls who dwelt on the Loire and the Roman garrisons did the same. Thus became the king of France the sovereign of two distinct nations inhabiting the same country and governed by different laws. The Franks were ruled by their customs; the Romans by the Imperial law. The estates of the former were beneficiary, and temporary; those of the latter were held *pleno jure* and perpetual, and now or soon after began to be called Allodial, but the Romans mortified by the odious distinctions made between themselves and the Gentiles Homines converted their own allodial estates as soon as they could into benefices and quitted their own laws for the Salic. The Roman law thus disappeared in the Northern parts of modern France, which are still called the *païs des coutumes*; whereas in the Southern parts where no such disagreeable distinctions had been made, the Roman law kept it's ground and is to this day almost entirely observed. These countries are called *païs de loi ecrite*, ie. of the Roman law. Sulliv. *Lect. 5.*

764. The king, probably because as general he was thought fittest to distribute the conquered lands to each according to his merits, about this time (the beginning of the 5th century) assumed to himself, and was quietly allowed the entire power of the partition of lands. They were still, and for some considerable time longer, assigned in the general assemblies, but according to his sole will and pleasure, to the several lords, who afterwards subdivided them to their followers, in the same manner, at their discretion : whence it came that these grants were called BENEFICES, and are constantly discribed as flowing from the pure bounty of the lord. But in this the king was not so arbitrary as may seem. For first he was obliged to use a prudent discretion, otherwise it might have excited a rebellion, and secondly tho' he could assign what land he pleased to any of the Franks, he could assign to none but a Frank, nor could he leave any one of the Franks unprovided of a sufficient portion, unless his behavior had notoriously disqualified him. Sull. *Lect.* 5 That this distribution of lands was not originally in the king see Cæsar. *1. 6. c. 20. cited ante 740.*

765. The introduction of estates for life is conjectured to have been owing to the Counts. They lived apart from the other barbarians among the Romans who possessed Allodial property. It was natural for them to wish to hold their emploiments, which were lucrative and honorable, on a more durable and certain footing. They therefore purchased estates for life in them, the king being generally so necessitous as to be willing to raise money any way. The example was quickly followed by the other barbarians who were immediate tenants of the crown. Thus estates for life, created by particular grants encreased in number till anno 600, by which time almost every military tenure was become for life. This accounts for the regard shown by the feudal law to a tenant of the FREEHOLD, for 1. His estate was more permanent, long terms being then unknown. and 2. It was more honorable as it was a proof that he was a military tenant, and descended from the old German freemen, for it was long after that Soccage lands in imitation of these came to be granted for life. Estates for life being now become common and in high estimation it was thought proper they should be conferred with more solemnity. The oath of fealty by the tenant and INVESTITURE by the lord were introduced therefore. They went on the land, the tenant having taken the oath of fealty the lord or his attorney gave actual possession by delivering a part of the premises as a turf, a twig, a hasp of the door, in name of the whole, in presence of the PARESCURIAE. But there was also another kind of investiture called the improper investiture which was performed not on the land, by delivering a staff, a ring, a sword or clothing him with a robe, which last being the most commonly used among the great tenants of the crown gave rise to the name of INVESTITURE. But this did not transfer the actual possession till livery and seizin on the land in presence of the *parescuriæ*. It only gave the tenant a right to compel his lord by suit to transfer the possession. Hence was derived the rule that entry into any one parcel of lands in name of the whole was an entry into all in the same county ; for the same *pares curiæ* who knew he entered into one knew he did it in name of the whole. Whereas into lands in a separate county a separate entry was necessary in presence of the *pares curiæ* of that county who were the only competent witnesses of it in antient times. If the fact of investiture was ever after denied the tenant produced two or more of the *pares curiæ* who swore each that he had either been present at the investiture himself, or had constantly heard his father declare that he was. This testimony was permanent enough while estates were given for life only, but when they began to be made still more durable, as they soon were with the church the BREVIA TESTATA, or deeds, in writing were introduced. These were attested by some of the *pares curiæ*, and authenticated by the seal of the lord, or by his name and sign of the cross. The other symbols in improper investitures thus went out of use, and the delivery of a deed became the ordinary sign, tho' still an actual livery and seisin was requisite. It was a peculiarity in the English law that termors for years took the oath of fealty, whereas in the other countries of Europe none did it who held lesser estates than for life. By the oath of fealty the tenant was obliged to assist his lord in all defensive wars whatever, and in all offensive ones which were not evidently unjust. The lord on his part was obliged to warrant and defend the lands he had given his tenant, by arms if attacked in open war [from whence the terms WARRANTY and GUARRANTIE], and in courts of justice, by appearing upon his voucher, that is, the tenant's calling him in to defend his right, and if the lord failed he was bound to give lands of equal value, or if he had none, an equivalent in money on the Continent, but not in England. This was the origin of Voucher in real actions. The tenant was to enjoy the issues and profits of the land, rendering the services reserved to the lord. If he failed to do this the lord might enter, the smallest breach in those antient times being an absolute forfeiture. But afterwards when the military were commuted for pecuniary or other considerations, *the milder* way of DISTRESS was found out, the lords, instead of the lands themselves, taking possession of the goods and chattels of this tenant found on them, and keeping them as a deposit till satisfaction was made. Thus was distress introduced. Sulliv. *Lect.* 6.

766. A proper fief was where military service only to be performed in person was reserved, and that of uncertain duration and occasions, but improper benefices were of various kinds : 1. Grants to the church wherein the reservations were not of military service, and the continuance of the grant was perpetual. 3. Grants, where the oath of fealty was remitted. 3. Where a condition was annexed, either enlarging or diminishing the estate. 4. Where other services, besides military ones were reserved. 5. Where other services were reserved, and no military service at all, this was Socage. 6. If no services were reserved, except general fealty. 7. Grand-serjeanty, which was a certain service done by the body of a man to the person of the king. These Grand-serjeanties were either military, or not military. Of the first kind are the carrying the k's banner, or lance, or to lead his army, that is, to be constable, or to number and array his army, that is to be his marschal. The office of high constable was last held by Edwd' D. of Buckingham as earl of Hersford in H. VIII' s time, and on his attainder becoming forfeit to the crown. It has been since discontinued, the power being thought too great for a subject. The office of Earl Marshall is still in the family of Norfolk ; but as he is nothing but an assistant to the high Constable, he is consequently nothing when there is no high-constable. The Grand-serjeanties which are not military are various : such as the performing services in person at a coronation, the lord high-stewardship or seneschalship of England, whose office it is to preside at the trials of peers. This office was annexed to the barony of Hinckley, which passing into the family of Leicester, and then into that of Lancaster, in the person of H. IV, was united to the crown : and as his powers and privileges were thought too extensive and dangerous, this officer hath since that been only occasionally created, as for a coronation, or the trial of a peer, which ended, he breaks his staff, and the office is vacant. The office of Butlerage in Ireland (which was a right of prisage of two tons of wine, one before, the other behind the mast of every ship containing twenty tons or more) continued in the family of Ormond till 1715. When Car. II. purchased it by a perpetual pension of £ 4000. a year. This was not a service arising from a grant of lands, but an antient profit of the crown due by prerogative. 8. Petty serjeanty which is a yearly yeilding of a bow, a sword, or some other small thing belonging to war, and is a tenure of the king's person. Of this nature is the grant of the province of Maryland to Ld., Baltimore who yeilds every Christmas five Indian arrows and a fifth of all gold and silver found in the province. 9. Grants to women who were obliged to serve by deputy. 10. Grants of things incorporeal, which not being capable of manual livery, could only be conveyed by the improper or symbolical investiture. In the transfer of these the law of England admits of no other symbol but a deed, that there may be full evidence what was conveied. To this class belonged the *feudum de* Cavena, which was an allowance of necessaries out of the King's or Lord's cellar or pantry. Also the *feudum de* Camera, which seems to have been a substitution for the *feudum de cavena* : for instead of an allowance of necessaries, it is an annual allocation of a sum of money, for will, years, or life, granted out of the chamber where the king or lord kept his money. Such are pensions, and salaries granted by the king to officers or others. As the *feudum de cavena* by the feudal law was not due at the stated time unless there were provisions in the *Cavena*, but was to wait till provisions came in, so the *feudum de Camera* is not due at any stated time unless there be money in the *Camera*, and that free from debts, and they must wait for their arrears till money comes in, for the Lord's safety and dignity is first to be considered. Another peculiarity of these is that they are mostly granted for life or of a lesser estate, whereas other feuds have generally become hereditary. Sulliv. *Lect.* 7.

767. There are still other improper benefices mentioned by the feudal writers, which as well as the foregoing may be divided into two kinds, gratuitous, for services already performed, or Officious, in consideration of future services. Of the first kind were two species. 1. *Feudum soldatæ*, which was a pension in money. 2. *Feudum habitationis*, which was a liberty of dwelling in a house belonging to the lord, in whom the property and possession still remained. Of the Officious feuds

Corvinus mentions three kinds. 1. *Feudum guardiæ*, which was a pension for the defence of a castle, in the nature of the modern salaries of governors of garrisons. 2. *Feudum gastaldiæ*, a pension for transacting the lord's business. 3. *Feudum mercedis*, in consideration of being an advocate or defender of the lord. Such are grants *pro consilio impendendo*, and the salaries of the crown lawyers. An advowson in England is also an improper benefice. [*The author then proceeds to shew the origin of the rights of advowson as possessed by laymen ; but his account of them is neither ingenious nor probable. He would make us believe that all those rights are usurpations on those of the clergy ; though the proofs of the reverse are numerous and incontestable, and tho' himself has shewn that for 1000 years the right of electing bishops was held by the people at large, and was got from them by the combined machinations of the clergy and emperor. In this as well as in many other parts of his book he shews himself to have imbibed principles very unfriendly to the rights of mankind and favorable to the pretended divine rights of the king and clergy. Take a sample from this lecture : speaking of the k's title to be supreme Ordinary he sais 'it stands better settled on the parliamentary declaration, and on the* reason of the thing *that all coercive power should be derived from him* whom God hath made the superintendant, *than on the assertions of lawyers that it alwais was so.*] (*Sull. Lect.* 8.

768. In the infancy of the Christian church, when the clergy was supported by the voluntary contributions of the people, the bishop was chosen by the clergy and people at large. This method was so firmly established that when the emperors became Christians, and made great donations of lands to the church, they left the right of election where they found it, and so it continued in Rome until the year 1000, a least ; but popular elections being productive of much brigue, cabal, and irregularity the clergy and emperors concurred in remedying the evil, which was at length effected by excluding the laity gradually and confining the election to the ecclesiastics. Many of the emperors indeed struggled hard to get the nomination to themselves, but the clergy proving too powerful for them, they obtained at most but a power of recommendation. In the Northern kingdoms as the lands given by the princes to the bishops were held of them, they possessed the right of investiture. This seemed to clash with the clerical right of election and produced struggles thro all Europe till about the year 1200, when the popes in general prevailed; for they had now set up a claim to the nomination as supposing themselves the feudal lords of all churchmen. From this time and more especially since the reformation their power has been declining, and in England particularly the king is confessedly possessed of the patronage or advowson of bishoprics, tho' a form of ecclesiastical election is still kept up. *Sull. Lect.* 8.

769. '*They who serve by the altar should live by the altar*' sais the New Testament, but it is silent as to the manner of raising this support. In the very first ages of Christianity when preachers were few and confined to the neighborhood of Jerusalem the Christians sold all they had and lived out of the common stock, but as they increased in numbers, this was found impracticable, so that each retained his possessions and gave a voluntary contribution. This was the fund of the church, and was a sufficient fund in those times of fervent zeal in the laity, and of simplicity of manner in the clergy. The revenues of the church continued to encrease till the time of Constantine, for tho' by the Roman laws there could be no legacies or donations to any fraternities which had not the sanction of the imperial authority, yet they found means to obtain many private grants both of moveable foods and lands. In the 4th century the restraint being taken away, those largesses from the rich became much greater. Tythes began then to be preached up by the clergy. [*The Author then proceeds to give a good history of the introduction of tythes in the* *other Christian countries as well as England, and also of Modusses*] *Sull. Lect.* 9.

770. A Seignory is an incorporeal interest remaining in the lord, and has annexed to it two kinds of services, to wit. those due from the person of the tenant, and those due from the land. The personal services are those which flow impliedly from the oath of fealty, such as to give warning of any injury done, or impending, to advise, to keep his secrets, to submit to his judicial decisions, and, if the tenure be military, to follow the lord to war. A submission to the decisions of the lord being one of the duties of fealty, to decline his judgment on allegation of partiality or for any other cause would have been a breach of fealty, and so was not allowed by the feudal law. Hence, tho by the Roman law a judge might be recused for almost all the causes for which jurors may in our law, it became a maxim in the English law and in other feudal countries, that a judge cannot be challenged. To avoid however the injustice which this would often produce, Assessors, or co-judges were added on the continent (from which came our *pares curiæ*) but in England the suitor on application to the King's courts was allowed to appeal thither. To the Seignory or Reversion were incident Fealty and Services, the former being inseparable therefrom, but the latter separable. Antiently the lord or reversioner on the smallest failure in fealty or service was entitled to enter and take possession of the lands as absolutely forfeited: and this continued long the case in military tenures. But in soccage holdings which were not for the defence of the realm, but only for the interest of the lord, this was thought too rigourous. The Roman method therefore of Distress was introduced into these tenures, and afterwards, when, by a commutation of the military services into a certain sum of money called escuage the damage done the lord became reducible to certainty, distress in military holdings also was substituted instead of forfeiture. Hence all feudal rents or Rent-Services as our law calls them (because they are the services due from the tenant to his lord) are of common right distrainable; because the lord might formerly have entered for the absolute forfeiture, and so now may enter for distress in lieu thereof. But there is another kind of rent, not distrainable, and therefore called RENT-SECK. This is where a man grants a rent out of his land to a stranger. Here the grantor reserving his land, the grantee does not become his lord, so was not entitled to a forfeiture formerly, nor at this day to enter for distress. Another kind of rent seck was introduced by the stat. of *Quia emptores*. Before that stat. if a man conveied his lands in fee simple he might, and usually did, reserve the tenure and right of reversion to himself. A rent reserved on such a sale was therefore subject to distress, but that stat. transferred the tenure in all cases where the vendor parted with his whole estate, to the superior lord; the vendor therefore ceasing to be lord, and his right of reversion being gone, cannot distrain for it. The inconveniences of these rent secks therefore produced a third kind called RENT-CHARGES, which are nothing more than a rent-seck armed with a power of distress by the special agreement of the parties. DISTRESSES being thus introduced, came into practice for the other feudal services as well as for rents. Thus they were used to oblige persons to appear in courts of justice, or to raise fines or amerciaments inflicted on them, because suit and service being a feudal duty, a failure in them subjected the party, as formerly to forfeiture, so now to distress. There is however a kind of distress, not arising from the feudal contract, but from the delictum of a stranger. This is called DISTRESS FOR DAMAGE-FEASANT. This is a seisure of any moveable doing damage to the ground, and may be taken in the night. The power of distress was antiently an engine of great oppression in the hands of the lords. By the stat. of Marlebridge however and other subsequent statutes, it is restrained. 1. Nothing may be distrained but moveables, and of these such only as may be restored in the same plight. Therefore a smith's anvil, or a millstone, or corn in sheaves could not be distrained, (the latter however is by statute made distrainable). 2. The instruments of a man's livelihood cannot be distrained, unless they be damage feasant as a plough-beast. 3. Things sent to public places of trade, as cattle in a market, corn in a mill, cloth in a shop are privileged. 4. Things already in custody of the law, as goods taken in execution. 5. Things in manual possession as an ax in a man's hand, or a horse I am riding on unless he be damage feasant. Distress must not be excessive as two sheep where one will do, or an ox for 12^d, where this other smaller distress. No distress can be taken in the king's highway, for that is privileged, nor could it be taken out of the fee of the lord till a statute was made to permit it. No distress can be taken in the night, for as rent can only be tendered by day perhaps the tenant may have his rent ready to pay next morning. Goods distrained, if they be of a kind subject to damage by the weather must be put into a POUND COVERT; if they be living cattle they may be put into a Pound-overt, or covert : but if the latter they are to be fed and kept at the peril and expence of the distrainer. By latter statutes no distress shall be divided and put into several pounds ; nor shall be impounded out of the hundred or barony except in a pound overt in the same county within three miles of the place. Pounds covert for dead chattels must be also within three miles. If distress is made where nothing is due the tenant may rescue at any time before it is impounded ; but when it is once put into a pound it is in the custody of the law and can only be taken out by REPLEVIN. The writ of replevin was formerly sued out of the Chancery ; but this being inconvenient in remote parts of the Kingdom the stat. of Marlebr. empowered the sheriff to make replevin without writ on the plaint of the plaintiff. He is to take security *ad prosequendum*, and also *de retorno habendo*, that is that if the pl. is cast he shall return the same distress. If any thing was due, the pl. may relieve his distress by tendering it. *Sulliv. Lect. 10.*

771. The feudal lands having changed by degrees from tenancies for years into estates for life, partly by the necessities and partly by the favor of the lords, they began to advance still further. To this the number of allodial estates in the hands of the Romans greatly contributed; for it could not be agreeable to the conquerors to see their own posterity in a more precarious situation as to property than those of the vanquished. Their roving manner of life too being now antiquated they became fond of their dwellings, and began to improve them, and it seemed hard that such their improvements should go to a stranger. The descendant would therefore of course be thought entitled to a preference which was usually enforced by a present, called a fine or RELIEF from the Latin word RELEVARE, which signified a lifting or lightening the hand of the lord from the lands. But this came by way of new investiture from the lord, the son being obliged to petition him HUMILITER ET DEVOTE, to tender his relief, and offer to take the oath of fealty. If he did not do this in a year and a day, the fief was given to a stranger. This being at first a matter of favor, some vassals found means to secure their sons by taking the grant to themselves and one or more of their sons by name, or to themselves and their sons generally. In the latter case all the sons succeeded in equal portions as among the Romans, but this did not include grandsons. These reliefs being at first arbitrary occasioned many struggles. The first redress on that head was by the *magna charta* of Henry the first which prescribed that reliefs should be of a lawful and certain sum. We find by Glanville that in the reign of H. II, the relief of a knight was become fixed at 100 shillings, but that of a noble fee was still incertain. By the *Magna charta* of John however all were fixed, to wit a count's at 100 pounds, a baron's at 100 Marks, and a knight's at 100 shillings, then supposed one fourth of the annual value of the inheritance.

The soccage tenants beginning now to obtain inheritances in imitation of the Military, the lord exacted from them usually a relief of a year's value. This also was at length fixed at a certain sum and by the sinking of the value of money and rise of the value of lands these reliefs became at length quite inconsiderable. Some doubt being entertained whether a grant to a man and his son was good longer than for the life of the grantor, and great disturbances arising thereon in which the people in their indignation put to death Bruneehild the regent, who had resumed some such grants, and also her infant son, Clovis who succeeded confirmed those estates in the year 613. New grants then came on continually for still more generations ; tho still, if no successor was named the grant was only held to be for life : whence our maxim that a « feoffment to a man for ever » is but an estate for life. What contributed to precipitate the growth of inheritances in feudal holdings was the nature of the Allodial estates in their neighborhood. The Romans and Gauls who held them were under very humiliating distinctions. They were not members of the state : their lives were compensated by half the sum paid for the life of a Frank : neglect or contumacy to a court, in a Frank punished by imprisonment only, in them brought on a forfeiture of estate : for the lightest crimes they were put to the ordeal : a Frank only for murder.No wonder then they wished to enroll themselves among the conquerors, but they would hardly give up their inheritable estates to take back an estate for life only. They obtained therefore their grants to be restored with a right of inheritance. This pointed out the way to the Franks, who taking every advantage of the favor or weakness of their kinds obtained similar grants. To such a number had these inheritances increased in the year 730, that the kingdom was in danger of being lost to the Saracens for want of a sufficient number of life-estates to encourage the soldiery. Charles Martel to remedy this seised on the lands of the church which he granted out to the souldiers, part for life only, and part in allodio ; thus forming a new balance among the allodial, feudal, and life holders. Charlemagne followed the same policy, passing several laws to restrain the growth of inheritable feuds. His successors however were less politic, and more necessitous. They gave way to the tide of inheritance. Charles the Bold about 860 permitted the allodiaries to submit their estates to feudal tenure of others as well as of the king. Another law entitled the son of a tenant for life to claim the estate of right. Another gave to the sons of counts (who were the king's officers over the allodiance) a right of succession to their fathers : by which means not only the allodial lands but the demesnes of the crown in his county became the demesnes of the Count. Thus was the door opened to subinfeudations and all their extensive consequences, and a new system of polity, never before seen in the world was introduced, to wit. The feudal, such as it reigned about the year 1050 on the continent, and was brought into England in a state of maturity by William the conqueror. *Sulliv. Lect. 11.*

772. Homage is another of the fruits of feudal tenures, and draws with it others in consequence. Being the symbol of a strict and indissoluble bond between the bloods of the lord and tenant, it mutually disabled them from doing any thing to the prejudice of each other. As the lord could not alien without the confirmation of the tenant, declared by his ATTORNMENT, so neither could the tenant alien without consent of the lord. This gave occasion to the lords to exact a FINE ON ALIENATION which became at length an established fruit of tenure. This however was abolished in England by the stat. of *Quia emptores terrarum*, which gave every one free license to sell, the alienee holding of the lord, but this statute not naming the king he continued to take fines on alienation till the Restoration when these tenures were abolished. The tenant also became at length obliged to attorn, an action of *Quid juris clamat* being given to the lord compelling him to attorn unless he could shew reasonable cause to the contrary. Homage also produced WARRANTY on the part of the lord, by which he was obliged to defend the lands of the tenant, or otherwise to give him an equivalent in other lands if any he had, or should afterwards acquire. On the Continent it was carried farther, the lord, if he had no lands, being obliged to make compensation in money. The manner of taking advantage of a warranty was thus. The tenant, when impleaded for his lands, VOUCHED (i. e. VOCAT, calls) his lord to warrant the lands. If the lord does not appear, he is summoned till he does. If he appears and will not enter on the warranty, the tenant is to shew how he is bound to warrant, the pl's action lying still in the mean time. If the lord is cast either in his defence or by failing to defend, the pl. has judgment against the tenant for the lands, and he against the lord for equivalent lands, so that in such case there were in fact two judgments. In like manner there would be three judgments if the voucher was double, as where the first vouchee vouched another. Warranties furnished two devices for defeating the stat. *de donis* ; the first was by contriving a collateral warranty to descend on the issue in tail. [*The reason why this bound was shortly this. At the common law all warranties descended from ancestor to heir and bound the heir whether he had assets from that ancestor or not. The stat.* de donis *using these words « so that they to whom the land was given etc. shall have no power to alien etc. restrains all warranties descending from persons within the line of gift. (yet the stat. of Gloster having allowed a descent of warranty with assets to bar in certain cases in which it had otherwise, prohibited alienation, the judges by extending the equity of that statute to the stat.* de donis *undertook to permit warranties even descending from one in the line of gift, to bar the heir intail if assets descended to him from that same ancestor, these assets then being to pass in tail as the other lands would have done.) but the stat. de donis* *took no notice of warranties descending from an ancestor out of the line of gift. As therefore these bound at the common law, so they continued to bind after the statute, without the descent of equivalent assets. For instance. A. has a brother B, and a son C. a stranger gives lands to C. in tail. C. sells them and procures either his father A. or uncle B. to pass a warranty to the purchaser. On the death of A. or B. the warranty descends on C. and on his death it descends on his issue ; and as it came from an ancestor who was not in the line of gift, it is out of the provision of the stat. de donis (which as was said only restrains the warranty of « those to whom the land was given etc. ») and therefore binds the issue by the common law. Warranties by those within the line of gift are by our lawyers called Lineal Warranties ; those from ancestors not within the line of gift they contradistinguish by the technical appellation of Collateral Warranties, not because they descend from a collateral ancestor, which is sometimes not true (as in the case before put if the warranty was made by A. the father) but because they descend from an ancestor who is out of the line of descent, or collateral to the line of descent.*] The second device was thought of in the time of E. IV. A. the ten. in tail having agreed to sell to I. S. is by him impleaded as pretending an antient title. A. vouches B. a stranger who has not a foot of land and is in no danger of ever having any. He enters into the warranty and makes default. Judgm̃t is given that I. S. shall recover the lands of A. and he again equivalent lands of B. and tho' B. has none yet as there is a possibility he may acquire some, and so A. or the issue in tail may hereafter have satisfaction, it was adjudged a bar. This is what is called a COMMON RECOVERY. WARDSHIP is another fruit of feudal tenures. As the profits and military duties of the tenement were equivalents, and the lord was obliged to answer to the king for all the military duties in his seignory, it was just that he should have the profits of the tenement of a deceased tenant, till his heir became capable to do them. This the law adjudged to be at the age of *21*, if a male ; but if a female, at 14, at which time she was supposed old enough to marry and so to find a substitute. The lord had likewise the guardianship of the heir's person, [*note the author here speaks only of military tenures*] unless he had a father; in which case the father was guardian by nature of the person, and the lord was guardian of the lands, but in these cases tho' the possession and profits (after maintaining the heir suitable to his condition) were in the lord, yet the fee and inheritance remained in the ward. This interest of the lord was of a chattel nature as appears from two circumstances. 1. That he might assign it over before the alienation of real estates was permitted by law. 2. that on his death it went to his exr̃ and not to his heir. *Sulliv. Lect. 12.*

773. MARRIAGE of the ward was another of the feudal fruits. It took place only in military tenures. At first it extended only to the marriage of females, and to prevent oppression there was attempted by a stat. in the time of H. 1. When Glanville wrote which was in the reign of H. 11, it had not yet extended to males, but in Bracton's time, temp. H. 3, the right to the marriage of male heirs was established, and notwithstanding several legislative attempts to the contrary it continued to be one of the greatest engines of oppression till the Restoration, when by the conversion of military into soccage tenures it was abolished. The SOCCAGE tenures not being instituted for the defence of the realm, but for the interest of the lord who received certain services for them, he had no claim to the wardship of either the person or lands of the heir ; it sufficed to him if his services were yeilded (*sic*). The guardianship was given to the nearest relation who could not inherit the lands, as, if they descended on the side of the father, the nearest of kin on the part of the mother was guardian ; herein differing from the Roman law which appointed the next heir, guardian. This our lawyers deemed to be *quasi agnum lupo committere* : but perhaps attending to the state of the two people, that the Romans were civilized, the Northern nations not so, we shall think each proper where it was instituted. The guardian in soccage differed from the guardian in chivalry in this, that he was but as a bailiff or receiver for his ward, and was obliged to account for all the profits after being allowed reasonable disbursements. This guardianship too expired at the age of 14, at which time the heir might chuse another guardian, or occupy the lands himself. If he failed to do either, the former guardian continuing to take the profits was liable to account (not as guardian for he is no longer such but) as bailiff or receiver, upon a legal presumption that he was appointed by the minor to act for him. So if the next of kin refuses or neglects to take on him the guardianship and a stranger enters and takes the profits, the law presumes him acting for the infant, and subjects him to an action of account). *Sulliv. Lect. 13.*

774. In tracing the progress of Descents, Dr. Sullivan does not differ materially from Dalrymple ante 577, 578, 579, and his account is less ingenious and less perspicuous. He has a few observations however worthy notice. In speaking of that rule which confines descents to the blood of the first acquirer, and which did not admit them to pass to his collateral relations, he observes one reason was that the personal merit of the first grantee was the motive of the grant ; and again that his oath of fealty obliged him to bring up his own sons in principles of obedience and attachment to the lord, whereas his collateral relations having been brought up by those who were not his feudatories at all, would have no such attachment, and so were less likely to be admitted to the succession. After hereditary succession was established it was some time before the right of primogeniture took place. The lord, as head of the military society named such of the sons as was most likely to perform the military duties. So late as the time of H. 2. that king gave the military lands of Geoffry de Mandeville to his son by a second ventre in exclusion of the eldest by a former wife *eo quod melior essel miles.* As to kingdoms, where there was no superior to make the appointment, sometimes the king with consent of his states appointed his successor, in other cases the states assembled and chose one. This election usually falling on the eldest son paved the way for establishing the right of primogeniture. Hugh Capet in France caused his son Robert to be crowned and *sworn allegiance to* in his life time. Robert neglecting this precaution, Henry his younger son was chosen in preference to the elder. Henry and his successor's followed Capet's example for 100 years by which time the right of the eldest son was so fully established in the nations of men, that the crowning in the life of the father was laid aside as unnecessary, William the Conqueror, in England, chose to rest his title to the crown on an election which was formally made. When pressed to declare his successor, he only signified his wish that William might succeed, but declared he would leave the people of England free as he found them. William, and afterwards H. 1, was elected in preference to Robert the elder brother. On the death of H. 2, his eldest son Richard assumed no title but that of duke of Normandy till he was elected and crowned. The title of John was notoriously by election and his son H. 3. was the first who was introduced to his subjects by the words « behold your king. » From that time lineal succession has been established, and the crown instead of being in abeyance till the coronation, vests on the death of a king in his successor ; and the date of his reign is taken not from the day of his coronation as formerly, but from the death of his predecessor. Hence has arisen the maxim that the king never dies. Succession in all it's lines took place first in patrimonial possessions, which were called antient fiefs. Then it became a practice to grant the new fiefs as the antient ones, « *feudum novum ut antiquum* » in which case the new descended on as extensive principles as the old. The right of inheritance as finally settled is to be thus traced : if there be no children, you go up to the FATHER and descend to his children (that is the brothers and sisters of the deceased) and all their issues. If there be none of these, go to the grandfather by the father and so down to his children (uncles and aunts to the deceased) and their issues. If none, go to the great-grandfather and return down thro' his issues, and so on. If no issue of a male ancestor be found as far back as you can trace, then you turn to the female ancestors inverting the rule of tracing, by descending, instead of ascending. Thus if the descendants of the male line failed in the great grandfather, you take his wife and search for her heirs. If none, take the grandfather's wife and so on. Since the reign of king Stephen there have been so many of the new fees granted on the terms of old ones that it has been considered as the law of the land. In the 13th, century for the first time Europe saw a woman sole invested with royalty. This was Joan of Naples. Margaret of Denmark Norway and Sweden, Joan the 2d; of Sicily, and Isabella of Castile followed in the next century. In the following century came Mary and Elizabeth in England, and many since in all parts of Europe, France alone and some of the German principalities excepted, wherein descent to females has never yet been introduced in the case of the crown. *Sulliv. Lect. 14.* [*In the cases Sullivan mentions of kings appointing their successors, it should be noted they did not succeed by virtue of that appointment, which the king had no right to make, but of the approbation of the people which attended it and of their oaths of eventual allegiance which they took to the successor at the time of his nomination and which obliged them to support him on the death of his father*].

775. Le droit des gens est naturellement fondé sur ce principe que les diverses nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible, sans nuire à leurs véritables intérêts. *Mont. Esprit des Lois. L. 1. c. 3.*

776. Les lois, qui établissent le droit de suffrage (1), sont fondamentales dans un gouvernement démocratique, (*because by their votes the people exercise their sovereignty*). Il est important d'y régler comment, par qui, à qui, sur quoi, les suffrages doivent être donnés. Il est essentiel de fixer le nombre des citoyens qui doivent former les assemblées ; sans cela on pourroit ignorer si le peuple a parlé, ou seulement une partie du peuple. — Le peuple qui a la souveraine puissance, doit faire par lui-même tout ce qu'il peut bien faire ; et ce qu'il ne peut pas bien faire, il faut qu'il le fasse par ses ministres. Ses ministres ne sont point à lui, s'il ne les nomme. C'est donc une maxime fondamentale de ce gouvernement, que le peuple nomme ses ministres, c'est-à-dire, ses magistrats. [*He seems to consider the division of the Roman citizens into classes by Servius Tullius where they voted according to wealth, as establishing the government in aristocracy ; and that the institution of Solon among the Athenians preserving to every citizen his right of voting, as fixing it of a democratic nature*]. Lorsque le peuple donne ses suffrages, sans doute ils doivent être publics ; et ceci doit être regardé comme une loi fondamentale de la démocratie. Mais lorsque dans une démocratie le sénat donne les suffrages, comme il n'est là question que de prévenir les brigues, les suffrages ne sçauroient être trop secrets. La brigue est dangereuse dans un sénat : elle ne l'est pas dans le peuple (2). Le malheur

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(1) The theory of popular sovereignty is so commonly found in the writers of the time that Montesquieu can hardly be considered as the « source » of Jefferson on this particular point. Besides the Declaration of Independence, see however *Rights of British America* « Their rights are derived from the laws of nature, and are not the gift of their chief magistrate » *M.E., I, 209* — and *Opinions on the French treaties* : « I consider the people who constitute a society or nation as the source of all authority in that nation ; as free to transact their common concerns by any agent they think proper ; to change these agents individually, or the organization of them in form or function whenever they please ». (April, 1793. *M.E., III, 227.*)

(2) The influence over government must be shared among all the

d'une république, c'est lorsqu'il n'y a plus de brigues et cela arrive lorsqu'on a corrompu le peuple à prix d'argent, il devient de sang froid. *Id. L. 2. c. 2.*

777. *He considers political virtue or the Amor Patriæ, as the energetic principle of a democratic republic; moderation, that of an aristocratic republic; honor, that of a limited monarchy; and fear, that of a despotism; and shews that every government should provide that it's energetic principle should be the object of the education of it's youth. L. 3. 4.* (1).

778. *That it's laws also should be relative to the same principle. In a democracy, equality and frugality should be promoted by the laws, as they nurse the amor patriæ. To do this, a census is advisable, discriminating the people according to their possessions; after which, particular laws may equalise them in some degree by laying burthens on the richer classes, and encouraging the poorer ones. In a commercial republic, where great wealth will be amassed by individuals, inheritances should be divided among all the children* (2). « Dans une république, où la vertu règne,

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people... The government of Great Britain has been corrupted, because but one man in ten has a right to vote for members of Parliament. The sellers of government, therefore, get ninth-tenths of their price clear. It has been thought that corruption is restrained by confining the right of suffrages to a few of the wealthier people; but it would be more effectually restrained by an extension of that right to such members as would bid defiance to the means of corruption. *Notes on Virginia*; *Query XIV, I, p. 207.*

(1) The same idea has been so often expressed by Jefferson practically in the same words and constitutes such an essential part of his doctrine that one hesitates to attribute it to Montesquieu. Note however that it is found in the passage of the *Notes on Virginia* quoted above: « Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary ». *Notes on Virginia*; *Query XIV, I, p. 207.*

(2) The act changing the course of descents, and giving the inheri-

motif qui se suffit à soi-même, et qui exclut tous les autres, l'état ne *récompense* que par des témoignages de cette vertu. C'est une règle générale, que les grandes récompenses, dans une monarchie et dans une république sont un signe de leur décadence ; parce qu'elle prouve que leurs principes sont corrompus ; què d'un cotée (*sic*), l'idée de l'honneur n'y a plus tant de force ; que, de l'autre, la qualité de citoyen s'est affoiblie. — Dans une (*sic*) gouvernement républicain les loix doivent forcer un citoyen à accepter les emplois publics, parce que les magistratures y sont des témoignages de vertu, des dépôts que la patrie confie à un citoyen, qui ne doit vivre, agir, et penser que pour elle : il ne peut donc pas les refuser (1). Un citoyen doit être aussi obligé d'accepter dans l'armée, une place inférieure à celle qu'il a occupée. On voyoit souvent chez les Romains, le capitaine servir, l'année d'après, son sous-lieutenant (2). C'est que dans les républiques, la vertu demande qu'on fasse à l'état un sacrifice continuel de soi-même et de ses répugnances. Dans les républiques, il seroit bien dangereux de faire, de la profession des armes, un état particulier, distingué

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tance to all the children, etc. equally, I drew as part of the revisal. *Autobiography, Appendix, Note G. M. E. I.*, 257.

If the overgrown wealth of an individual be deemed dangerous to the State, the best corrective is the law of equal inheritance to all in equal degree ; and the better, as this enforces a law of nature. *To Milligan, April 6, 1816, M.E. XIV, 466.*

See for Jefferson's participation in the preparation of the law of descents : *Autobiography*, I., 64.

(1) A good citizen should take his stand where public authority marshals him. *To duchesse d'Anville, April* 2, 1790, *M.E., VIII*, 16. But in a previous letter to James Monroe Jefferson had defended the opposite view : « Though I will admit that this does subject every individual if called on, to an equal tour of political duty, yet it can never go as far as to submit to it his whole existence ». *May 20, 1782, M.E. IV, 193.*

(2) I profess so much of the Roman principle, as to deem it honorable for the general of yesterday to act as corporal to-day, if his services can be useful to his country. *To W. Duane, October 1, 1812, M.E. XIII, 186.*

de celui qui a les fonctions civiles. C'est pourquoi on mettra sur une même tête les emplois civiles et militaires. On ne prend les armes, dans la république, qu'en qualité de défenseur des lois et de la patrie ; c'est parce que l'on est citoyen, qu'on se fait, pour un temps, soldat (1). — Dans une république, fondée sur la vertu il ne convient que les charges soient vénales. — (*see post 811.*)

Dans quel gouvernement faut-il des censeurs ? Il en faut dans une république, où le principe du gouvernement est la vertu. Ce ne sont pas seulement les crimes qui détruisent la vertu ; mais encore les négligences, les fautes, une certaine tiédeur dans l'amour de la patrie, des exemples dangereux, des semences de corruption ; ce qui ne choque point les lois, mais les élude ; ce qui ne les détruit pas, mais les affoiblit : tout cela doit être corrigé par les censeurs . *L. 5.* (2).

779. Si vous examinez les formalités .de la justice, par rapport à la peine qu'a un citoyen de se faire rendre son bien, ou à obtenir satisfaction de quelque outrage, vous en trouverez sans doute trop : si vous les regardez dans le rapport qu'elles ont avec la liberté et la sûreté des citoyens, vous en trouverez souvent trop peu ; et vous verrez que les peines, les dépenses, les longueurs, les dangers mêmes de la justice, sont le prix que chaque

The opposition of Jefferson to standing armies in time of peace is well known. See ***Proposed Virginia Constitution. Ford ed., II, 27*** : « There shall be no actual army but in time of actual war. » — « He has kept among us in times of peace, standing armies and ships of war without the consent of our legislatures. » *Declaration of Independence*, — « The Greeks and Romans had no standing armies, yet they defended themselves. The Greeks by their laws, and the Romans by the spirit of their people, took care to put into the hands of their rulers no such engine of oppression as a standing army. Their system was to make every man a soldier, and oblige him to repair to the standard of his country whenever that was reared. » *To Thomas Cooper. Sept. 10, 1814, M.E.XIV, 184.*

(2) No government ought to be without censors ; and where the press is free, no one ever will. *To Washington, September 9, 1792, M.E., VIII, 406.*

citoyen donne pour sa liberté. — Aussi, lorsqu'un homme se rend plus absolu, songe-t-il d'abord à simplifier les lois (1). On commence dans cet état à être plus frappé des inconvénients particuliers, que de la liberté des sujets, dont on ne se soucie point du tout. ib. L. 6. c. 2. Dans le gouvernement républicain, il est de la nature de la constitution, que les juges suivent la lettre de la loi. Il n'y a point de citoyen contre qui on puisse interpréter une loi, quand il s'agit de ses biens, de son honneur, ou de sa vie, *c. 3.*

780. Dans les états modérés, l'amour de la patrie, la honte, et la crainte du blâme, sont des motifs reprimants, qui peuvent arrêter bien des crimes. La plus grande peine d'une mauvaise action sera d'en être convaincu. — Dans ces états, un bon législateur s'attachera moins à punir les crimes, qu'à les prévenir, il s'appliquera plus à donner des mœurs, qu'à infliger des supplices. — Il seroit aisé de prouver que dans tous ou presque tous les états d'Europe, les peines ont diminué ou augmenté, à mesure qu'on s'est plus approché ou plus éloigné de la liberté. — Dans les gouvernements modérés, tout, pour un bon législateur, peut servir à former des peines. — En un mot, tout ce que la loi appelle une peine, est effectivement une peine. *c. 9.* — L'expérience a fait remarquer que, dans les pays où les peines sont douces, l'esprit du citoyen en est frappé, comme il l'est ailleurs par les grandes. Quelque inconvénient se fait-il sentir dans un état ? un gouvernement violent veut soudain le corriger ; et, au lieu de songer à faire exécuter les anciennes lois, on établit une peine cruelle qui arrête le mal sur le champ. Mais on use le ressort du gouvernement ; l'imagination se fait à cette grande peine, comme elle s'étoit faite à la moindre ; et, comme on diminue la crainte pour celle-ci, l'on est bientôt forcé d'établir l'autre dans tous les cas. — Il ne faut point mener les hommes par les voies extrêmes ; on doit être ménager des moyens que la nature nous donne pour les conduire. — Suivons la nature, qui a donné aux hommes la honte comme leur fléau ; et que la plus grande partie de la peine soit l'infamie de la souffrir. — Souvent, un législateur, qui veut corriger un mal, ne songe qu'à cette correction ; ses yeux sont ouverts sur cet objet, et fermés sur les inconvénients. Lorsque le mal est une fois corrigé, on ne voit plus que la dureté du législateur : mais il reste un vice dans l'état, que cette dureté a produit ; les esprits sont corrompus, ils se sont accoutumés au despotisme: c. 13. Il est essentiel que les peines aient de l'harmonie entre elles ; parce qu'il est essentiel que l'on évite plutôt un grand crime, qu'un moindre ; ce qui attaque plus la société, que ce qui la choque moins. C'est un grand mal, parmi nous, de faire subir la même peine à celui qui vole sur un grand chemin, et à celui qui vole et assassine. Il est visible que, pour la sûreté publique, il faudroit mettre quelque différence dans la peine. Quand il n'y a point de différence dans la peine, il faut en mettre dans l'espérance de la grâce. En Angleterre, on n'assassine point, parce que les voleurs peuvent espérer être transportés dans les colonies ; non pas les assassins. C'est un grand ressort des gouvernements modérés, que les lettres de grâce, ce pouvoir que le (1) prince a de pardonner, exécuté avec sagesse, peut avoir d'admirables effets. *c. 16*. Nos pères les Germains n'admettoient guère que des peines pécuniaires. Un bon législateur prend un juste milieu. Il n'ordonne pas toujours des peines pécuniaires ; il n'inflige pas toujours des peines corporelles. Les peines pécuniaires doivent être proportionnées aux fortunes. *c. 18.* La clémence est la qualité distinctive des monarques. Dans la république, où l'on a pour principe la vertu, elle est moins necessaire. (*this confirms the conjecture in the margin that he does not think a power of pardon necessary but in monarchical governments*) *c. 21.*

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(1) Cæsar, Cromwell et tant d'autres », *Note of Montesquieu, transcribed by Jefferson.*

(2) Jefferson was certainly interested in these theories of Montesquieu, but it does not appear that he accepted them and made them his own. Montesquieu is not quoted in the *Bill for proportioning crimes and punishments,* although something of the spirit of this chapter reappears in the preamble of the bill.

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(1) This word shews that Montesquieu by « moderate governments » in this place, means monarchies. Probably too he had in view countries where punishments are too severe. *Quære* if in a republic, whose punishments should be mild and proportioned, he would not think with Marquis Beccaria # 46 that pardons should be excluded. *Note of Jefferson.*

781. Le Luxe est toujours en proportion avec l'inégalité des fortunes. Si, dans un état, les richesses sont également partagées il n'y aura point de luxe ; car il n'est fondé que sur les commodités qu'on se donne par le travail des autres. En considérant le luxe des divers peuples, les uns à l'égard des autres, il est, dans chaque état, en raison composée de l'inégalité des fortunes qui est entre les citoyens, et de l'inégalité des richesses des divers états. En Pologne, par exemple, les fortunes sont d'une inégalité extrême ; mais la pauvreté du total empêche qu'il n'y ait autant de luxe que dans un état plus riche. Le luxe est encore en proportion avec la grandeur des villes, et surtout de la capitale ; en sorte qu'il est en raison composée des richesses de l'état, de l'inégalité des fortunes des particuliers, et du nombre d'hommes qu'on assemble dans de certains lieux. *L. 7. c. 1.* Une frugalité absolue est l'objet des lois somptuaires des républiques. Mais ces lois peuvent avoir aussi pour objet une frugalité relative ; lorsque un état, sentant que des marchandises étrangères d'un trop haut prix demanderoient une telle exportation des siennes, qu'il se priveroit plus de ses besoins par celles-ci, qu'il n'en satisferoit par celles-là, en défend absolument l'entrée. Ce sont les seules lois somptuaires qui conviennent aux monarchies. *L. 7. c. 5.* Un peuple, par la force du climat, peut devenir si nombreux, et d'un autre côté les moyens de le faire subsister peuvent être si incertains, qu'il est bon de l'appliquer tout entier à la culture des terres. Ainsi pour savoir s'il faut encourager le luxe, ou le proscrire, on doit d'abord jeter les yeux sur le rapport qu'il y a entre le nombre du peuple, et de la facilité de le faire vivre. En Angleterre, le sol produit beaucoup plus de grains, qu'il ne faut pour nourrir ceux qui cultivent les terres, et ceux qui procurent les vêtements : il peut donc y avoir des arts frivoles, et par conséquent du luxe. *c. 6.*

782. La *corruption* de chaque gouvernement commence presque toujours par celle des principes. Le principe de la démocratie se corrompt, non seulement lorsqu'on perd l'esprit d'égalité, mais encore quand on prend l'esprit d'égalité extrême, et que chacun veut être égal à ceux qu'il choisit pour lui commander. Pour lors, le peuple, ne pouvant souffrir le pouvoir même qu'il confie, veut tout faire par lui-même, délibérer pour le sénat, exécuter pour les magistrats, et dépouiller tous les juges. Le peuple tombe dans ce malheur, lorsque ceux à qui il se confie, voulant cacher leur propre corruption, cherchent à le corrompre. On ne peut donner beaucoup au peuple, sans retirer encore plus de lui. Mais pour retirer de lui, il faut renverser l'état. Plus il paroitra tirer d'avantage de sa liberté, plus il s'approchera du moment où il doit la perdre. Il se forme de petits tyrans, qui ont tous les vices d'un seul, bientôt ce qui reste de liberté devient insupportable. Un seul tyran s'élève ; et le peuple perd tout, jusqu'aux avantages de sa corruption. La démocratie a donc deux excès à éviter : l'esprit d'inégalité qui la mène à l'aristrocratie, ou au gouvernement d'un seul ; et l'esprit d'égalité extrême, qui la conduit au despotisme d'un seul. (1)

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(1) If Jefferson has shared these views of Montesquieu when he read L'*Esprit des Lois,* he consistently maintained a very different attitude in his later career. He admitted that democracy was susceptible of corruption, but considered that the danger manifested itself chiefly when magistrates who had been entrusted with some powers by the

L. 8. c. 2. — L'aristrocratie se corrompt, lorsque le pouvoir des nobles devient arbitraire. Une aristrocratie peut maintenir la force de son principe, si les lois sont telles qu'elles fassent plus sentir aux nobles les périls et les fatigues du commandement que ses délices. *c. 5* Comme les démocraties se perdent, lorsque le peuple dépouille le sénat, les magistrats et les juges de leurs fonctions. Les *monarchies* se corrompent, lorsqu'on ôte peu à peu les prérogatives des corps, ou les privilèges des villes. Dans le premier cas, on va au despotisme de tous ; dans l'autre, au despotisme d'un seul. « Ce qui perdit les dynasties de Tsin et de Soüi, dit un auteur Chinois, c'est qu'au lieu de se borner, comme les anciens, à une inspection générale, seule digne du souverain, les princes voulurent gouverner tout immédiatement par eux-mêmes » *c. 6.* Le principe de la monarchie se corrompt lorsque les premières dignités sont les marques de la première servitude. Il se corrompt, lorsque le prince change sa justice en sévérité ; lorsqu'il met, comme les empereurs Romains, une tête de Méduse sur sa poitrine ; lorsqu'il prend cet air menaçant et terrible que Commode faisoit donner à ses statues. Le principe de la monarchie se corrompt, lorsque des âmes singulièrement lâches tirent vanité de la grandeur que pourroit avoir leur servitude ; et qu'elles croient que ce qui fait que l'on doit tout au prince fait que l'on ne doit rien à sa patrie *c. 7.* Lorsque les principes du gouvernement sont une fois corrompus, les meilleures loix deviennent mauvaises, et se tournent contre l'état : lorsque les principes en sont sains, les mauvaises ont l'effet des bonnes ; la force du principe entraîne tout. c. *11.* Quand une république est corrompue, on ne peut remédier à aucun des

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people, attempted to usurpate more extensive powers. *Notes on Virginia, Query XII, M.E., II,* 164. In theory at least, he had more leanings towards complete equality than towards any extension of the powers of public officers. In practice, on the other hand, and almost in every occasion, his sound common sense tempered whatever radicalism » may have existed in his political theories.

maux qui naissent, qu'en ôtant la corruption, et en rappellant les principes : tout autre correction est ou inutile, ou un nouveau mal. *c. 12.* Il est de la nature d'une république qu'elle n'ait qu'un petit territoire : sans cela, elle ne peut guère subsister (1). Dans une grande république, il y a de grandes fortunes, et par conséquent peu de modération dans les esprits : il y a de trop grands dépôts à mettre entre les mains d'un citoyen ; les intérêts se particularisent : un homme sent d'abord qu'il peut être heureux, grand, glorieux, sans sa patrie ; et bientôt, qu'il peut être seul grand sur les ruines de sa patrie. Dans une petite république, le bien public est mieux senti, mieux connu, plus près de chaque citoyen : les abus y sont moins étendus, et par conséquent moins protégés. *c. 16.* Un état *monarchique* doit être d'une grandeur médiocre, s'il étoit petit, il se formeroit en république : s'il étoit fort étendu, les principaux de l'état, grands par eux-mêmes, n'étant point sous les yeux du prince, ayant leur cour hors de sa cour, assurés d'ailleurs contre les exécutions promptes par les *lois* et par les *mœurs*, pourroient cesser d'obéir ; ils ne craindroient pas une punition trop lente et trop éloignée *c. 17.* Une grande empire (*sic*) suppose une autorité *despotique* dans celui qui gouverne. Il faut que la promptitude des résolutions supplée à la distance des lieux où elles sont envoyées ; que la crainte empêche la négligence du gouverneur ou du magistrat éloigné ; que la loi soit dans une seule tête ; et qu'elle change sans cesse comme les accidents qui se multiplient toujours dans l'état à proportion de sa grandeur. *c. 19.* Que si la propriété naturelle des petits états est d'être gouvernés en république, celle des médiocres, d'être soumis à un monarque, celle de grands empires d'être dominés par un despote ; il suit que, pour en conserver les principes du gouvernement établie, (*sic*) il faut maintenir l'état dans la grandeur qu'il avoit déjà ; et que cet état changera d'esprit, à mesure qu'on rétrécira, ou qu'on étendra ses limites. *c. 20.*

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(1) It is probably to this passage that Jefferson's hostility towards Montesquieu may be attributed. But he did not see until much later the danger they presented for his favorite political theories, which he had probably not yet developed when he wrote a synopsis of this chapter. An article of Hamilton in the *Federalist* shows what a weapon this opinion of Montesquieu had become in the hands of opponents of republicanism : « The opponents of the *plan* proposed here with great assiduity cited and circulated the observation of Montesquieu on the necessity of a contracted territory for republican government. But they seem not to have been apprised of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the principles to which they subscribe with such ready acquiescence. « (*Federalist, N° IX.*) Hamilton then quoted in full the passages in which Montesquieu explained how by establishing a system of federative states a republic could withstand the attacks of powerful enemies. Jefferson apparently forgot entirely these corrections added by Montesquieu himself and did not even refer to the notes he had previously taken (*see ♯ 779*). It was enough for him that Montesquieu could be used by his political enemies to justify rejecting his authority, at least ont his point.— « I suspect that the doctrine, that small states alone are fitted to be republics, will be exploded by experience, with some other brilliant fallacies accredited by Montesquieu and other political writers » (*To d'Ivernois, February 6, 1795, M.E., IX, 299*). — In March 1801, he wrote to Nathaniel Niles of Baltimore : « The late chapter of our history furnishes a new proof of the falsehood of Montesquieu's doctrine, that a republic can be preserved only in a small territory. The reverse is the truth. » (*M.E., IX,232*) — More than fifteen years later he had not forgotten that the opposition to the establishment of a truly republican governement had been strengthened by the views of Montesquieu : « I have much confidence that we shall proceed successfully for ages to come, and that, contrary to the principles of Montesquieu it will be seen that the larger the extent of country, the more firm its republican structure, if founded, not on conquest, but in principles of compact and equality ». (*To Barbé-Marbois, June 14, 1817, M.E., XV, 129*). This was precisely what Montesquieu himself had maintained,as may be seen by the last sentence of *Esprit des Lois IX, c., 1,* quoted by Jefferson ♯ *783.*

783. Si une république est petite, elle est détruite par une force étrangère : si elle est grande, elle se détruit par un vice intérieur (1). Ainsi il y a grande apparence que les hommes auroient été à la fois obligés de vivre toujours sous le gouvernement d'un seul, s'ils n'avoient imaginé une manière de constitution qui a tous les avantages intérieurs du gouvernement républicain, et la force extérieure du monarchique. Je parle de la république fédérative : cette forme de gouvernement est une convention, par laquelle plusieurs corps politiques consentent à devenir citoyens d'un état plus grand qu'ils veulent former. C'est une société de sociétés, qui en font une nouvelle, qui peut s'aggrandir par de nouveaux associés qui se sont unis. Cette sorte de république, capable de résister à la force extérieure, peut se maintenir dans sa grandeur, sans que l'intérieur se corrompe. La forme de cette société prévient tous les inconvénients. Celui qui voudroit usurper ne pourroit guère être également accrédité dans tous les états confédérés. S'il se rendoit trop puissant dans l'un, il allarmeroit tous les autres : s'il subjuguoit une partie, celle qui seroit libre encore pourroit lui résister avec des forces indépendantes de celles qu'il auroit usurpées, et l'accabler avant qu'il eut achevé de s'établir. S'il arrive quelque sédition chez un des membres confédérés, les autres peuvent l'appaiser ; si quelques abus s'introduisent quelque part, ils sont corrigés par les parties saines. Cet état peut servir d'un côté, sans périr de l'autre; la confédération peut être dissoute, et les confédérés rester souverains. Composés (*sic*) de petites républiques, il jouit de la bonté du gouvernement intérieur de chacune ; et à l'égard du dehors, il a, par la force de l'association tous les avantages des grandes monarchies. *L'esprit des lois. L. 9. c. 1.* La constitution fédérative doit être composée d'états de même nature, surtout d'états

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(1) In this article will be found the doctrine developed so many

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times by Jefferson, and yet he certainly would have denied that it had been formulated by Montesquieu. See particularly the *Kentucky resolutions* (*1798*), his letter *to the Rhode Island Assembly (May 1801)* and even his letter to Destutt de Tracy on the same subject, January *26, 1811*; and for a fuller discussion of it, cf. my book on *Jefferson et les Idéologues, p. 71–96.*

républicains. L'esprit de la monarchie est la guerre, et l'aggrandissement : l'esprit de la république est la paix et la modération. Ces deux sortes de gouvernements ne peuvent, que d'une manière forcée, subsister dans une république fédérative. c. 2. Dans la république de Hollande, une province ne peut faire une alliance sans le consentement des autres. Cette loi est très bonne, et même nécessaire, dans la république fédérative. Elle manque dans la constitution Germanique. [*By the constitution of the Lycian republic* (*which was an association of 23 cities. Strabo. L. 14.*) *each city voted and contributed in proportion toi t's size, and the judges and city magistrates were appointed by the common council. This he thinks preferable to the constitution of the Dutch states where each province has a single vote, appoints it's own magistrates, and pays only in proportion to their wealth*]. *ib. c. 3.* Pour qu'un état soit dans sa force, il faut que sa grandeur soit telle, qu'il y ait un rapport de la vitesse avec laquelle on peut exécuter contre lui quelque entreprise, et la promptitude qu'il peut employer pour la rendre vaine. La vraie puissance d'un prince ne consiste pas tant dans la facilité qu'il y a à conquérir, que dans la difficulté qu'il y a à l'attaquer. L'aggrandissement des états leur fait montrer de nouveaux côtés par où on peut les prendre *ib. c. 9.* Lorsqu'on a pour voisin un état qui est dans sa décadence, on doit bien se garder de hâter sa ruine ; parce qu'on est, à cet égard, dans la situation la plus heureuse où l'on puisse être. N'y ayant rien de si commode pour un prince, que d'être auprès d'un autre qui reçoit pour lui tous les coups et les outrages de la fortune, et il est rare que par la conquête d'un pareil état on augment (*sic*) autant en puissance réelle, qu'on a perdu en puissance relative. *ib. c. 10.*

784. La vie des états est comme celle des hommes. Dans le cas de la défense naturelle ils ont droit de tuer. Entre les citoyens, le droit de la défense naturelle n'emporte point avec lui la nécessité de l'attaque, mais, entre les sociétés, il entraîne quelquefois la nécessité d'attaquer ; lorsqu'un peuple voit qu'une plus longue paix en mettroit un autre en état de le détruire ; et que l'attaque est, dans ce moment, le seul moyen d'empêcher cette destruction. *L. 10. c. 2.* Du droit de la guerre, dérive celui de la conquête, qui en est la conséquence ; il en doit donc suivre l'esprit. Lorsqu'un peuple est conquis, le droit que le conquérant a sur lui, suit la loi de la nature, qui fait que tout tend à la conservation des espèces ; et la loi de la lumière naturelle qui veut que nous fassions à autrui ce que nous voudrions qu'on nous fît. *c. 3.* C'est à un conquérant à réparer une partie des maux qu'ils a faits. Je définis ainsi le droit de conquête : un droit nécessaire, légitime, et malheureux, qui laisse toujours à payer une dette immense, pour s'acquitter envers la nature humaine. *c. 4.* Il est contre la nature de la chose, qu'une république démocratique conquière des villes qui ne sauroient entrer dans la sphère de la démocratie (1). On doit borner la conquête au nombre des citoyens que l'on fixera pour la démocratie. Si une démocratie conquiert un peuple pour le gouverner comme sujet, elle exposera sa propre liberté ; parce qu'elle confiera une trop grande puissance aux magistrats qu'elle enverra dans l'état conquis. *c. 6.* Il y a encore un inconvénient aux conquêtes faites par les démocraties. Leur gouvernement est toujours odieux aux états assujettis. Il est monarchique par la fiction : mais, dans la vérité, il est plus dur que le monarchique, comme l'expérience de tous les temps et de tous les pays l'a fait voir. Les peuples conquis y sont dans un état triste ; ils ne jouissent ni des avantages de la république, ni de ceux de la monarchie. *c. 7.* Ainsi, quand une république tient quelque peuple sous sa dépendance, il faut qu'elle cherche à réparer les inconvénients qui naissent de la nature de la chose, en lui donnant un bon droit politique et de bonnes lois civiles. *c. 8.*

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(1) Here again Jefferson agrees with Montesquieu in condemning wars of conquest. « If there be one principle more deeply rooted than any other in the mind of every American, it is, that we should have nothing to do with conquest. » (*To William Short, July 28, 1791, M.E., VIII, 219.*) — Many others passages in which the same idea is expressed could be quoted ; it is one of the fundamental tenets of Jefferson's political system.

785. Dans une société où il y a des lois, la liberté ne peut consister qu'à pouvoir faire ce que l'on *doit* vouloir, et à n'être point contraint de faire ce que l'on ne doit pas vouloir; la liberté est le droit de faire tout ce que les loix permettent : et, si un citoyen pouvoit faire ce qu'elles défendent, il n'auroit plus de liberté, parce que les autres auroient tout de même ce pouvoir. *L'esp. des lois. L. 11., c. 3.* C'est une expérience éternelle, que tout homme qui a du pouvoir est porté à abuser ; il va jusqu'à ce qu'il trouve des limites (1). Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir. Une constitution peut être telle que personne ne sera contraint de faire les choses auxquelles la loi ne l'oblige pas, et à ne point faire celles que la loi lui permet *c. 4.*

786. La liberté philosophique consiste dans l'exercice de sa volonté, ou du moins dans l'opinion où l'on est que l'on exerce sa volonté. La liberté politique consiste dans la sûreté, ou du moins dans l'opinion que l'on a de sa sûreté. Cette sûreté n'est jamais plus attaquée que dans les accusations publiques ou privées. C'est de la bonté des lois criminelles que dépend principalement la liberté du citoyen. *L. 12. c. 2.* les lois qui font périr un homme sur la déposition (2) d'un seul témoin (3), sont fatales à la liberté. La raison en exige deux ; parce qu'un témoin qui affirme, et un accusé qui nie, font un partage ; et il faut un tiers pour le vider. *c. 3.* C'est le triomphe de la liberté, lorsque les lois criminelles tirent chaque peine de la nature particulière du crime. Il y a quatre sortes de crimes. 1, ceux qui choquent la religion, la peine desquelles doit consister dans la privation de tous les avantages que donne la religion ; l'expulsion hors des temples ; la privation de la société des fidèles, pour un temps, ou pour toujours ; la fuite de leur présence ; les exécrations, les détestations, les conjurations. 2. Ceux qui choquent les mœurs : telles sont la violation de la continence publique ou particulière. La privation des avantages que la société a attachés à la pureté des mœurs, les amendes, la honte, la contrainte de se cacher, l'infamie publique, l'expulsion hors de la ville et de la société, suffisent pour réprimer la témérité des deux sexes. 3. Ceux qui choquent la tranquillité des citoyens ; les peines desquelles sont ce qu'on appelle des supplices. C'est un espèce de talion, qui fait que la société refuse la sûreté à un citoyen qui en a privé, ou qui a voulu en priver un autre. *c. 4.* Le crime contre la nature ne fera jamais, dans une société, de grands progrès, si le peuple ne s'y trouve porté d'ailleurs par quelque coutume ; comme chez les Grecs, ou les jeunes gens faisoient tous leurs exercices nus ; comme chez nous, où l'éducation domestique est hors d'usage. Que l'on ne prépare point ce crime ; qu'on le proscrive par une police exacte, comme toutes les violations des mœurs ; et l'on verra soudain la nature, ou défendre ses droits, ou les reprendre. *c. 3.* C'est assez que le crime de lèse-majesté soit vague, pour que le gouvernement dégénère en despotisme. C'est encore un violent abus, de donner le nom de crime de lèse-majesté à une action qui ne l'est pas. Une loi des empereurs déclare les faux monnoyeurs coupables du crime de lèse-majesté. Mais, n'étoit-ce pas confondre les idées des choses ? porter sur un autre crime le nom de lèse-majesté, n'est-ce pas diminuer l'horreur du crime de lèse-majesté *c. 8*. Les lois ne se chargent de punir que les actions extérieures *c. 11*. Rien ne rend encore le crime de lèse-majesté plus arbitraire, que quand des paroles indiscrètes en deviennent la matière. Les discours sont si sujets à interprétation que la loi ne peut guère les soumettre à une peine capitale. La plupart du temps, elles ne signifient point par elles-mêmes, mais par le ton dont on les dit. Souvent, en redisant les mêmes paroles, on ne rend pas le même sens : ce sens dépend de la liaison qu'elles ont avec d'autres choses. Quelquefois fois le silence exprime plus que tous les discours. Il n'y a rien de si équivoque que tout cela. Comment donc en faire un crime de lèse-majesté ? Partout où cette loi est établie, non seulement la liberté n'est plus, mais son ombre même. Une simple punition correctionnelle conviendra mieux dans ces occasions. Les actions ne sont pas de tous les jours ; bien des gens peuvent les remarquer : une fausse accusation sur des faits peut être aisément éclaircie. Les paroles, qui sont jointes à une action, prennent la nature de cette action. Ce ne sont point les paroles que l'on punit ; mais une action commise, dans laquelle on emploie les paroles. *c. 12*. Il seroit absurde de violer les règles de pudeur dans la punition des crimes, qui doit toujours avoir pour objet le rétablissement de l'ordre. *c. 14*. La loi qui ordonne dans plusieurs états, sous peine de la vie, de révéler les conspirations auxquelles même on n'a pas trempé, ouvre la porte à tous les crimes. *c. 17*. Quand une république est parvenue à détruire ceux qui vouloient la renverser, il faut se hâter de mettre fin aux vengeances, aux peines, et aux récompenses mêmes. On ne peut faire de grands (*sic*) punitions, et par conséquent de grands changements, sans mettre dans les mains de quelques citoyens un grand pouvoir. Il vaut donc mieux dans ce cas, pardonner beaucoup, que punir beaucoup ; exiler peu, qu'exiler beaucoup ; laisser les biens, que multiplier les confiscations. Il faut rentrer le plus tôt que l'on peut, dans ce train ordinaire du gouvernement où les lois protègent tout, et ne s'arment contre personne. *c. 18*. Il y a, dans les états où l'on fait le plus de cas de la liberté, des loix qui la violent contre un seul, pour la garder à tous. Tels sont en Angleterre, les bills d'atteindre. Ils se rapportent à ces loix d'Athènes qui statuoient contre un particulier, pourvu qu'elles fussent faites par le suffrage de six mille citoyens. Si un homme, présumé coupable de ce que l'on appelle haut-crime avoit trouvé le moyen d'écarter les témoins, de sorte qu'il fut impossible de le faire condamner par la loi, on pourroit porter contre lui un bill particulier d'atteindre ; c'est-à-dire, faire une loi singulière sur sa personne. *c. 19*. Il arrive souvent dans les états populaires que les accusations sont publiques, et qu'il est permis à tout homme d'attaquer qui il veut. Cela a fait établir des lois propres à défendre l'innocence des citoyens. *c. 20*. Un citoyen s'est déjà donné une assez grande supériorité sur un citoyen, en lui prêtant un argent que celui-ci n'a emprunté que pour s'en défaire, et que par conséquent il n'a plus. Que sera-ce, dans une république, si les loix augmentent cette servitude encore davàntage ? Solon ordonna que personne ne seroit obligé par corps pour dettes civiles. *c. 21*. Les commissaires nommés quelquefois pour juger un particulier affoiblent (*sic*) la liberté dans les monarchies. Ils se croient toujours assez justifiés par les ordres du prince, par un obscur intérêt de l'état, par le choix qu'on a fait d'eux, et par leurs craintes mêmes. *c. 22*.

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(1) Mankind soon learn to make interested use of every right and power which they possess, or may assume. *Notes on Virginia. Query XIII, M.E., II, 164.*

(2) This may be true where evidence is given by deposition and the judge does not see the witness but *qu.* if the objection is good where the witness confronts the party and judges who may judge of the credibility of his testimony from his countenance, circumstances etc. and where the party himself is not put to his oath ? *Note of Jefferson.*

(3) Beccaria # 13. *Note of Jefferson.*

787. Les Revenus de l'état sont une portion que chaque citoyen donne de son bien, pour avoir la sûreté de l'autre, ou pour en jouir agréablement. Pour bien fixer ces revenus, il faut avoir égard et aux nécessités de l'état, et aux nécessités des citoyens. Il ne faut point prendre au peuple sur ses besoins réels, pour des besoins de l'état imaginaires. Il n'y a rien que la sagesse et la prudence doivent plus régler, que cette portion qu'on ôte, et cette portion qu'on laisse aux sujets. Ce n'est point à ce que le peuple peut donner, qu'il faut mesurer les revenus publics ; mais à ce qu'il doit donner. *L. 13. c. 1.* L'effet des richesses d'un pays, c'est de mettre de l'ambition dans tous les cœurs. L'effet de la pauvreté, est d'y faire naître le désespoir. Le premier s'irrite par le travail ; l'autre se console par la paresse. La nature est juste envers les hommes. Elle les récompense de leurs peines ; elle les rend laborieux, parce qu'à de plus grands travaux elle attache de plus grandes récompenses ; mais si un pouvoir arbitraire ôte les récompenses de la nature, on reprend le dégoût pour le travail, et l'inaction paroit être le seul bien. *c. 2.* On peut mettre des impôts sur les personnes, sur les terres, ou sur les marchandises ; dans l'impôt de la personne, la proportion injuste seroit celle qui suivroit exactement la proportion des biens. Chacun ait (*sic*) un nécessaire physique égal qui ne doit point être taxé ; l'utile vient ensuite, qui doit être taxé moins que le superflu. Les droits sur les marchandises sont ceux que les peuples sentent le moins, parce qu'on ne leur fait pas une demande formelle. Ils peuvent être si sagement ménagés, que le peuple ignorera presque qu'il les paie. Pour cela, il est d'une grande conséquence que ce soit celui qui vend la marchandise qui paie le droit. Il sait bien qu'il ne paie pas pour lui ; et l'acheteur, qui dans le fond paie, le confond avec le prix. D'ailleurs, pour que le citoyen paie, il faut des recherches perpétuelles dans sa maison. Rien n'est plus contraire à la liberté *c. 7.* Pour que le prix de la chose et le droit puissent se confondre dans la tête de celui qui paie, il faut qu'il y ait quelque rapport entre la marchandise et l'impôt ; et que sur une denrée de peu de valeur, on ne mette pas un droit excessif. *c. 8.* L'expérience a fait voir qu'un impôt sur le papier sur lequel le contrat doit s'écrire vaut beaucoup mieux qu'un impôt sur les diverses clauses des contrats civils. *c. 9.* Règle générale, on peut lever des tributs plus forts, à mesure que la servitude augmente. Cela a toujours été, et cela sera toujours.

C'est une règle tirée de la nature, qui ne varie point. *c. 12.* Le tribut naturel au gouvernement modéré, est l'impôt sur les marchandises. Cet impôt étant réellement payé par l'acheteur, quoique le marchand l'avance, est un prêt que le marchand a déjà fait à l'acheteur. On sent donc que plus le gouvernement est modéré, que plus l'esprit de liberté règne, que plus les fortunes ont de sûreté, plus il est facile au marchand d'avancer à l'état, et de prêter en particulier des droits considérables. C. *14.* Une maladie nouvelle s'est répandue en Europe ; elle a saisie (*sic*) nos princes, et leur fait entretenir un nombre désordonné de troupes. Elle a ses redoublements, et elle devient nécessairement contagieuse : car sitôt qu'un état augmente ce qu'il appelle ses troupes, les autres soudain augmentent les leurs ; de façon qu'on ne gagne rien par là, que la ruine commune. *c. 17.* [*The author is utterly against farming the collection of taxes, unless at the beginning of a new species of tax, when he supposes the ingenuity of farmers, excited by private interest, may suggest amendments and improvements in the mode of levying. He sais that in England the administration of the revenues from the Excise and Post office was borrowed from farmers. c. 19*].

788. Les mauvais législateurs sont ceux qui ont favorisé les vices du climat, et les bons sont ceux qui s'y sont opposés. *L. 14. c. 5.* La culture des terres est le plus grand travail des hommes. Plus le climat les porte à fixer ce travail, plus la religion et les lois doivent y exciter. *c. 6.* Pour vaincre la paresse du climat, il faudroit qu'elles cherchassent à ôter tous les moyens de vivre sans travail. *c. 17..*

789. De l'esclavage civil (1). Dans la démocratie où tout le monde est égal, et dans l'aristrocratie où les loix doivent faire leurs efforts pour que tout le monde soit aussi égal que la nature du gouvernement peut le permettre, des esclaves sont contre l'esprit de la constitution. Ils ne servent qu'à donner aux citoyens une puisssance et un luxe qu'ils ne doivent point avoir. *L. 15. c. 1.* De quelque nature que soit l'esclavage, il faut que les loix civiles cherchent à en ôter, d'un côté les abus, et de l'autre les dangers. La raison veut que le pouvoir du maître ne s'étende point au-delà des choses qui sont de son service. Les loix de la pudicité sont du droit naturel, et doivent être conservées. Il y a une disposition de la loi des Lombards qui paroit bonne pour tous les gouvernements. « Si un maître débauche la femme de son esclave ceux-ci sont tous deux libres ». *C. 12.* Dans les états modérés, il est très important qu'il n'y ait point trop d'esclaves. De telles gens sont des ennemis naturels de la société ; et leur nombre seroit dangereux. Rien ne met plus près de la condition des bêtes, que de voir toujours des hommes libres, et de ne l'être pas. Il ne faut pas être étonné que dans les gouvernements modérés, l'état ait été si troublé par la révolte des esclaves et que cela soit arrivé si rarement dans les états despotiques. *c. 13.*

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(1) The views of Jefferson on slavery coincide in many respects with Montesquieu's ; but his documentation was far more complete than Montesquieu's (*Notes on Virginia. Query XIV, M.E., 191–201.*) and his personal interest in the question much stronger. For his early attitude towards slavery see : *Autobiography, M.E., I, 4.*

L'humanité que l'on aura pour les esclaves pourra prévenir dans l'état modéré, les dangers que l'on pourroit craindre de leur trop grand nombre. Les nations simples, et qui s'attachent elles-mêmes au travail, ont ordinairement plus de douceur pour leurs esclaves, que celles qui y ont renoncé. Les premiers Romains vivoient, travailloient, et mangeoient avec leurs esclaves : ils avoient pour eux beaucoup de douceur et d'équité. Les mœurs suffisoient pour maintenir la fidélité des esclaves ; il ne falloit point des loix. Mais lorsque les Romains se furent aggrandis ; comme il n'y avoit point de mœurs, on eut besoin de loix terribles pour établir la sûreté de ces maîtres cruels, qui vivoient au milieu de leurs esclaves comme au milieu de leurs ennemis. *c. 16.* Le magistrat doit veiller à ce que l'esclave ait sa nourriture et son vêtement : cela doit être réglé par la loi. Les loix doivent, avoir attention qu'ils soient soignés dans leurs maladies et dans leur vieillesse. Par une loi des Grecs, les esclaves trop rudement traités par leurs maîtres pouvoient demander d'être vendus à un autre. Un maître irrité contre son esclave, et un esclave irrité contre son maître, doivent être séparés. Quand un citoyen maltraite l'esclave d'un autre, il faut que celui-ci puisse aller devant le juge. Les loix qui ôtent aux esclaves la défense naturelle doivent leur donner la défense civile. A Athènes on punissoit sévèrement, quelquefois même de mort, celui qui avoit maltraité l'esclave d'un autre. La loi d'Athènes, avec raison, ne vouloit point ajouter la perte de la sûreté à celle de la liberté. *c. 17.* Quand dans le gouvernement républicain, on a beaucoup d'esclaves, il faut en affranchir beaucoup. Le mal est, que si l'on a trop d'esclaves, ils ne peuvent être contenus ; si l'on a trop d'affranchis, ils ne peuvent pas vivre, et l'état peut être également en danger d'eux. — Il ne faut pas faire tout-à-coup et par une loi générale, un nombre considérable d'affranchissements. On sait que chez les Volsiniens, les affranchis, devenus maîtres des suffrages, firent une abominable loi, qui leur donnoit le droit de coucher les prisonniers avec les filles qui se mariaient à des ingénus. — Il y a diverses manières d'introduire insensiblement de nouveaux citoyens dans la république. Les loix peuvent favoriser le pécule, et mettre les esclaves en état d'acheter leur liberté. Elles peuvent donner un terme à la servitude, comme celles de Moyse, qui avoit borné à six ans celle des esclaves Hébreux. Il est aisé d'affranchir toutes les années un certain nombre d'esclaves, parmi ceux qui par leur âge, leur santé, leur industrie, auront le moyen de vivre. On peut même guérir le mal dans sa racine : comme le grand nombre d'esclaves est lié aux divers emplois qu'on leur donne, transporter aux ingénus une partie de ces emplois, par exemple le commerce ou la navigation c'est diminuer le nombre des esclaves. *c. 18.*

790. *Montesquieu speaking of the effect of climate in disposing men to liberty or servitude sais* « qu'il est important à un très-grand-prince de bien choisir le siège de son empire. Celui qui le placera au midi risque de perdre le nord ; et celui qui le placera au nord conservera aisément le midi ». *L. 17. c. 8.*

791. La bonté des terres d'un pays y établit naturellement la dépendance (1). Les gens de la campagne, qui y font la principale partie du peuple, ne sont pas si jaloux de leur liberté : ils sont trop occupés, et trop pleins de leurs affaires particulières. Une campagne qui regorge de biens craint le pillage, elle craint une armée. *L. 18. c. 1.* Dans les pays de montagnes on peut conserver ce que l'on a, et l'on a peu à conserver. La liberté est le seul bien qui mérite qu'on le défende ; les montagnards se défendent aisément, ils sont attaqués difficilement. *c. 2.* Les paysans ne sont pas cultivés en raison (proportion) de leur fertilité, mais en raison de leur liberté. *c. 3.* La stérilité des terres rend les hommes industrieux, sobres, endurcis au travail, courageux, propres à la guerre ; il faut bien qu'ils se procurent ce que le terrain leur refuse. *c. 4.* Les peuples des isles sont plus portés à la liberté que les peuples du continent. Les isles sont ordinairement d'une petite étendue ; une partie du peuple ne peut pas être si bien employée à opprimer l'autre ; la mer les sépare des grands empires, et arrête les conquérants. *c. 5.* les pays que l'industrie des hommes a rendus habitables, et qui ont besoin, pour exister, de la même industrie, appellent à eux le gouvernement modéré : comme la Hollande que la nature a faite pour avoir attention sur elle-même, et non pas pour être abandonnée à la nonchalance ou au caprice. *c. 6.* Les loix ont un très grand rapport avec la façon dont les divers peuples se procurent la subsistance. Il faut un code plus étendu pour un peuple qui s'attache au commerce ; moins pour ceux qui cultivent la terre ; moins pour ceux qui vivent de leurs troupeaux ; et encore moins pour ceux qui vivent de la chasse. *c. 8.* On voit toujours marcher d'un pas égal les arts, les connoissances, et les besoins. *c. 15.*

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(1) Jefferson's love for agriculture is too well-known to require any quotation here. For him agriculture, virtue and liberty are synonymous expressions. « Those who labor in the earth are the chosen people of God », *Notes on Virginia, M.E., II, 229.* — Only once, as far as I know, did he echo some of the views of Montesquieu on the subject. When, on account of difficulties with France, in 1798, he foresaw that the United States might have to give up their sea-trade' he wrote to General Gage : « How far it may lessen our happines to be rendered merely agricultural, how far that state is more friendly to the principles of virtues and liberty, are questions yet to be solved.» — *February 21, 1798, M.E., IX, 443.*

792. Plusieurs choses gouvernent les hommes, le climat, la religion, les loix, les maximes du gouvernement, les exemples des choses passées, les mœurs, les maximes ; d'où il se forme un esprit général qui en résulte. *L. 19. c. 4.* C'est au législateur à suivre l'esprit de la nation, lorsqu'il n'est pas contraire aux principes du gouvernement ; car nous ne faisons rien de mieux que ce que nous faisons librement en suivant notre génie naturel. *c. 5.* Les coutumes d'un peuple esclave sont une partie de sa servitude : celles du peuple libre sont une partie de sa liberté. *c. 27.*

793. Le commerce a du rapport avec la constitution. Dans le gouvernement d'un seul, il est ordinairement fondé sur le luxe ; et quoiqu'il le soit aussi sur les besoins réels, son objet principal est de procurer à la nature qui le fait tout ce qui peut servir à son orgueil, à ses délices, et à ses fantaisies (1). Dans le gouvernement de plusieurs, il est plus souvent fondé sur l'économie. les négocians ayant l'œil sur toutes les nations de la terre, portent à l'une ce qu'ils tirent de l'autre. Comme cette espèce de trafique n'est fondé que sur la pratique de gagner peu, et même de gagner moins qu'aucune autre nation, et de ne se dédommager qu'en gagnant continuellement, il n'est guère possible qu'il puisse être fait par un seul peuple chez qui le luxe est établi, qui dépense beaucoup, et qui ne voit que de grands objets. *L. 20. c. 4.* L'Angleterre n'a guère de tarif réglé avec les autres nations ; son tarif change, pour ainsi dire à chaque parlement, par des droits particuliers qu'elle ôte, ou qu'elle impose. Elle a voulu encore conserver sur cela son indépendance. D'autres nations ont fait céder des intérêts du commerce à des intérêts politiques : celle-ci a toujours fait céder ses intérêts politiques aux intérêts de son commerce. *c. 7.* On a fait dans certaines monarchies, des loix très propres à abaisser les états qui font le commerce d'économie. On leur a défendu d'apporter d'autres marchandises que celles du crû de leur pays : on ne leur a permis de venir trafiquer qu'avec des navires de la fabrique du pays où ils viennent. Il faut que l'état qui impose des loix puisse aisément faire lui-même le commerce : sans cela, il se fera, pour le moins, un tort égal, il vaut mieux avoir affaire à une nation qui exige peu, qui a des nécessités d'être fidèle etc. qu'à d'autres toujours rivales, et qui ne donneroient tous ces avantages. *c. 8.* La vraie maxime est de n'exclure aucune nation de son commerce sans de grandes raisons. C'est la concurrence qui met un prix juste aux marchandises, et qui établit les vrais rapports entre elles. Encore moins un état doit s'assujettir à ne vendre ses marchandises qu'à une seule

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(1) It would require a separate study to examine Jefferson's views on commerce. One would see that his public utterances did not always coincide with the views he entertained privately. The explanation for this seeming contradiction can be found in a letter to Hogendorp : « You ask what I think on the expediency of encouraging our States to be commercial ? Were I to indulge in my own theory. I should

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wish them to practice neither commerce nor navigation, but to stand, with respect to Europe, precisely on the footing of China... But this is theory only, and a theory which the servants of America are not at liberty to follow. Our people have a decided taste for navigation and commerce ». *October 13, 1785, M.E., V, 183.*

nation, sous prétexte qu'elle les prendra toutes à un certain prix. *c. 9.* Là où il y a du commerce, il y a des douanes ; l'objet du commerce est l'exportation et l'importation des marchandises en faveur de l'état ; et l'objet des douanes est un certain droit sur cette même exportation, aussi en faveur de l'état. Il faut donc que l'état soit neutre entre sa douane et son commerce, et qu'il fasse en sorte que ces deux choses ne se croisent pas ; et alors on y jouit de la liberté du commerce. *c. 13.* La loi de Genève qui exclut des magistratures, et même de l'entrée dans le grand conseil, les enfants de ceux qui ont vécu ou qui sont morts insolvables, à moins qu'ils n'acquittent les dettes de leur père, est très bonne. La foi particulière y a encore la force de la foi publique, *c. 16.* Le prince ne doit point faire le commerce, *c. 19.* Il est contre l'esprit de la monarchie que la noblesse y fasse le commerce. L'usage qui a permis en Angleterre le commerce à la noblesse, est une des choses qui ont le plus contribué à (1) affoiblir le gouvernement monarchique, *c. 21.* Les loix qui ordonnent que chacun reste dans sa profession et la fasse passer à ses enfants ne sont et ne peuvent être utiles que dans les états de despotisme, ou personne ne peut, ni ne doit avoir d'émulation. On fera mieux sa profession, lorsque ceux qui auront excellé, espéreront de parvenir à une autre, *c. 22.* Les richesses consistent en fonds de terre, ou en effets mobiliers : les fonds de terre de chaque pays sont ordinairement possédés par ses habitants. Ce genre de richesses appartient donc à chaque état en particulier mais les effets mobiliers, comme l'argent, les billets, les lettres de change, les actions sur les compagnies, les vaisseaux, toutes les marchandises, appartiennent au monde entier, qui, dans ce rapport, ne compose qu'un seul état, dont toutes les sociétés sont les membres : le peuple qui possède le plus de ces effets mobiliers de l'univers, est le plus riche. Quelques états en ont une immense quantité ; ils les acquièrent chacun par leurs denrées, par le travail de leurs ouvriers, par leur industrie, par leurs découvertes, par le hasard même. L'avarice des nations se dispute les meubles de tout l'univers. Il peut se trouver un état (1) si malheureux, qu'il sera privé des effets des autres pays, et même encore de presque tous les siens : les propriétaires des fonds de terre n'y seront que les colons des étrangers. Cet état manquera de tout, et ne pourra rien acquérir ; il vaudroit bien mieux qu'il n'eut de commerce avec aucune nation du monde : c'est le commerce qui, dans les circonstances où il se trouvoit, l'a conduit à la pauvreté. Un pays qui envoie toujours moins de marchandises ou de denrées qu'il n'en reçoit, se met lui-même en équilibre en s'appauvrissant : il recevra toujours moins, jusqu'à ce que, dans une pauvreté extrême, il ne reçoive plus rien. Dans les pays de commerce, l'argent qui s'est tout-à-coup évanoui, revient, parce que dans les états dont nous parlons, l'argent ne revient jamais, parce que ceux qui l'ont pris ne doivent rien. *c. 23.*

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(1) It would be happy if every monarchy could be weakened equally, *Note of Jefferson.*

794. De même que l'argent est un signe d'une chose, et la représente ; chaque chose est un signe de l'argent, et le représente : et l'état est dans la prospérité, selon que, d'un côté, l'argent représente bien toutes choses ; et que, d'un autre, toutes choses représentent bien l'argent, et qu'ils sont signes les uns des autres, c'est-à-dire, que, dans leur valeur relative, on peut avoir l'un, sitôt que l'on a l'autre. Si les loix favorisent un débiteur injuste, les choses qui lui appartiennent ne représentent point l'argent, et n'en sont point un signe, *L. 22. c. 2.*

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(1) *This melancoly truth applies to the American colonies whose trade is so regulated by a foreign commercial power as to center all it's benefits in herself. Note of Jefferson.*

This note seems to contain the germ of the *Summary view of the rights of British America* : « These acts prohibit us from carrying, in quest of other purchases, the surplus of our tobaccos, remaining after the consumption of Great Britain is supplied ; so that we must leave them with the British merchants for whatever he will please to allow us, to be by him re-shipped to foreign markets where he will reap the profits of making the sole of them for full value... This country which had been acquired by the lives, the labors and fortunes of individual adventurers, was by these Princes, several times parted out and distributed among the favorites and followers of their fortunes. *August 1774, M.E., I, 181.* See also a letter to John Campbell. *August* 1809, *M.E., XII, 307.*

795. L'obligation naturelle qu'a le père de nourrir ses enfans a fait établir le mariage, qui déclare celui qui doit remplir cette obligation, *L. 23. c. 2.* C'est la raison qui dicte que, quand il y a un mariage, les enfans suivent la condition du père ; et que, quand il n'y en a point, ils ne peuvent concerner que la mère. C'est pour cela que, chez les nations qui ont des esclaves, l'enfant suit presque toujours la condition de la mère, *c. 3.* Dans les pays où la loi d'une seule femme est établie, il a fallu flétrir le concubinage ; il a donc fallu flétrir les enfans qui en étoient nés. Dans les républiques où il est nécessaire que les mœurs soient pures, les bâtards doivent être encore plus odieux que dans les monarchies, *c. 6.* Dans les petites républiques, ou institutions singulières, il peut y avoir des loix qui donnent aux magistrats une inspection sur les mariages des enfans des citoyens, que la nature avoit déjà donnée aux pères. L'amour du bien public y peut être tel qu'il égale, ou surpasse tout autre amour, mais, dans les institutions ordinaires, c'est aux pères à marier leurs enfans : leur prudence, à cet égard, sera toujours au-dessus de toute autre prudence, *c. 7.* En Angleterre, les filles abusent souvent de la loi, pour se marier à leur fantaisie, sans consulter leurs parens. Je ne sçais pas si cet usage ne pourroit pas y être plus tolérés (*sic*) qu'ailleurs, par la raison que les loix n'y ayant point établi un célibat monastique, les filles n'y ont d'état à prendre que celui du mariage, et ne peuvent s'y refuser, *c. 8.* Les filles, que l'on ne conduit que par le mariage aux plaisirs et à la liberté, sont assez portées au mariage : ce sont les garçons qu'il faut encourager, *c. 9.* C'est la facilité de parler, et l'impuissance d'examiner, qui ont fait dire que plus les sujets étoient pauvres, plus les familles étoient nombreuses ; que, plus on étoit chargé d'impôts, plus on se mettoit en état de les payer : deux sophismes qui ont toujours perdu, et qui perdront à jamais les monarques, *c. 11.* Les pays de pâturages sont peu peuplées (*sic*), parce que peu de gens y trouvent de l'occupation. Les terres à bled occupent plus d'hommes, et les vignobles infiniment davantage. Les pays où des mines de charbon fournissent des matières propres à brûler ont cet avantage sur les autres, qu'il ne faut point des forêts, et que toutes les terres peuvent être cultivées. Dans les lieux où croit le vin, il faut de grands travaux pour ménager les eaux. Beaucoup de gens y peuvent donc être occupés, *c. 14.* Lorsqu'il y a un (*sic*) loi agraire, et que les terres sont également partagées, le pays peut être très peuplé, quoiqu'il y ait peu d'arts ; parce que chaque citoyen trouve, dans le travail de sa terre, précisément de quoi se nourrir. Mais dans les états où les fonds de terre sont inégalement distribués, il sera (1) plus de fruits que ceux qui les cultivent n'en peuvent consommer. Rien ne les engage à travailler l'année d'ensuite. Les fruits ne seroient point consommés par les gens oisifs, car les gens oisifs n'auroient point de quoi les acheter. Il faut donc que les arts s'établissent, pour que les fruits soient consommés par les laboureurs et les artisans. Ces machines, dont l'objet est d'abréger l'art, ne sont pas toujours utiles. Si un ouvrage est à un prix médiocre, et qui convienne également à celui qui l'achète, et à l'ouvrier qui l'a fait ; les machines qui en simplifieroient la manufacture, c'est-à-dire, qui diminueroient le nombre des ouvriers seroient pernicieuses, *c. 15.* (2). César donna des récompenses à ceux qui avoient beaucoup d'enfans ; il défendit aux femmes qui avoient moins de quarante-cinq ans, et qui n'avoient ni mari, ni enfans, de porter des pierreries, et de se servir de litières : méthode excellente d'attaquer le célibat par la vanité. On attacha quelques prérogatives au mariage seul ; d'autres à ceux qui avoient des enfans ; de plus grandes à ceux qui avoient trois enfans. Il ne faut pas confondre ces trois choses : il y avoit de ces privilèges dont les gens mariés jouissoient toujours ; comme, par exemple, une place particulière au théâtre ; il y en avoit dont ils ne jouissaient que lorsque des gens qui avoient des enfants ou qui en avoient plus qu'eux, ne les leur ôtoient pas. Les gens mariés qui avoient le plus grand nombre d'enfans, étoient toujours préférés, soit dans la poursuite des honneurs, soit dans l'exercise de ces honneurs même. Le consul qui avoient (*sic*) le plus d'enfans prenoit le premier les faisceaux ; il avoit le choix des provinces : le sénateur qui avoient (*sic*) le plus d'enfans étoit écrit le premier dans le catalogue des sénateurs ; il disoit, au sénat, son avis le premier. L'on pouvoit parvenir avant l'âge aux magistratures, parce que chaque enfant donnoit dispense d'un an. Si l'on avoit trois enfans, à Rome on étoit exempt de toutes charges personnelles. Les femmes ingénues qui avoient trois enfans, et les affranchies qui en avoient quatre, sortoient de cette perpétuelle tutelle, où les retenoient les anciennes lois de Rome. Ceux qui n'étoient point mariés ne pouvoient rien recevoir par le testament des étrangers ; et ceux qui, étant mariés, n'avoient point d'enfans, n'en recevoient que la moitié.

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(1) Here Jefferson has considerably modified the test of Montesquieu, abridging and practically re-writing it. It goes without saying that the anglicism « *il sera* » for « *il y aura* » is not found in *L'Esprit des Lois.*

(2) As all the political writers of the period Jefferson has often discussed the problem of population. One may find a good summary

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of his views in his letter to J-B. Say, February 1rst, 1804. His conclusion at least is in the style of Montesquieu : « So invariably do the laws of nature create our duties and interests, that when they seem to be at variance, we ought to suspect some fallacy in our reasonings. In solving that question, too, we should allow its just weight to the moral and physical preference of the agricultural over the manufacturing man. » *M.E., XI, 2.* For a discussion of this letter, see my book *Jefferson et les Idéologues, p., 16.*

Les Romains se marioient pour être héritiers, dit Plutarque, et non pour avoir des héritiers. Les avantages qu'un mari et une femme pouvoient se faire par testament, étoient limités par la loi. Ils pouvoient se donner le tout, s'ils avoient des enfans l'un de l'autre ; s'ils n'en avoient point, ils pouvoient recevoir la dixième partie de la succession à cause du mariage ; et s'ils avoient des enfans d'un autre mariage, ils pouvaient se donner autant de dixièmes qu'ils avoient d'enfans. Si un mari s'absentoit d'auprès de sa femme pour autre cause que pour les affaires de la république, il ne pouvoit en être l'héritier. La loi donnoit à un mari, ou à une femme, qui survivoit, deux ans pour se remarier : et un an et demi dans le cas du divorce. Les pères qui ne vouloient pas marier leurs enfans, donner le (*sic*) dot à leurs filles, y étoient contraints par les magistrats. On ne pouvoit faire de fiançailles, lorsque le mariage devoit être différé de plus de deux ans. Le sénatus-consulte déclaroit inégal le mariage d'une femme qui avoit plus de cinquante ans avec un homme qui en avoit moins de soixante. La loi interdisoit aux sénateurs le mariage avec les femmes qui avoient été affranchies, ou qui s'étoient produites sur le théâtre, ou qui avoient mené une mauvaise vie, ou qui avoient été condamnées par un jugement public. Les peines portées contre ceux qui se marioient contre la défense de la loi, étoient les mêmes que celles portées contre ceux qui ne se marioient point du tout. Par les lois anciennes, la faculté naturelle que chacun a de se marier, et d'avoir des enfans, ne pouvoit être ôtée : ainsi, quand on recevoit un legs à condition de ne point se marier, la loi annulloit cette condition. Les clauses *en gardant viduite*, établies parmi nous contredisent donc le droit ancien, et descendent des constitutions des empereurs faites sur les idées de la perfection du célibat, *c. 21*. Louis XIV ordonna de certaines pensions pour ceux qui auroient dix enfants, et de plus fortes pour ceux qui en auroient douze : mais il n'étoit pas question de récompenser des prodiges.

Pour donner un certain esprit général qui portât à la propagation de l'espèce, il falloit établir, comme les Romains, des récompenses générales, ou des peines générales, *c. 27.* Lorsqu'un état se trouve dépeuplé par des accidens particuliers, des guerres, des pestes, des famines, il y a des ressources. Les hommes qui restent peuvent conserver l'esprit de travail et d'industrie. Le mal presque incurable est lorsque la dépopulation vient de longue main, par un vice intérieur, et un mauvais gouvernement. Les pays désolés par le despotisme, ou par les avantages excessifs du clergé sur les laïcs, les pays ou le clergé, le prince, les villes, les grands, quelques citoyens principaux, sont devenus insensiblement propriétaires de toute la contrée, en sont des grands exemples (1). Dans cette situation, il faudroit distribuer des terres à toutes les familles qui n'ont rien ; leur procurer les moyens de les défricher, et de les cultiver, *c. 28.* Quand la nation est pauvre, la pauvreté particulière dérive de la misère générale. Tous les hôpitaux du monde ne sçauroient guérir cette pauvreté particulière : au contraire l'esprit de paresse qu'ils inspirent augmente la pauvreté générale, et par conséquent la particulière. Henri VIII voulant réformer l'église d'Angleterre, détruisit les moines, et les hôpitaux, pratiquant l'hospitalité entretenoient la paresse des autres. Depuis ce changement, l'esprit de commerce et d'industrie s'établit en Angleterre. Les nations riches ont besoin d'hôpitaux, parce que la fortune, dans un si grand nombre de branches de commerce, y est sujette à mille accidens : mais des secours passagers vaudroient bien mieux que des établissemens perpétuels. Le mal est momentanée (*sic*) : il faut donc des secours de même nature et qu'ils soient appliquables à l'accident particulier (1), *c. 29.*

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(1) Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural rights — *To Rev. James Madison, October 28, 1785, M.E., XIX, 18.*

796. Comme la religion et les loix civiles doivent tendre principalement à rendre les hommes bons citoyens on voit que, lorsqu'une des deux s'écartera de ce but, l'autre doit y tendre davantage. Ainsi, au Japon, la religion dominante ne proposant point de paradis ni d'enfer, les loix, pour y suppléer, ont été faites avec une sévérité et exécutées avec une ponctualité extraordinaire lorsque la religion condamne des choses que les loix civiles ne permettent de leur côté, ce que la religion doit condamner. Les loix qui font regarder comme nécessaire ce qui est indifférent, ont cet inconvénient, qu'elles font considérer comme indifférent ce qui est nécessaire, *L. 24. c. 14.* Les loix civiles doivent corriger les loix de la religion, et *e contra*, *c. 15. 16.* quand une religion ordonne la cessation du travail, elle doit avoir égard aux besoins des hommes, plus qu'à la grandeur de l'être qu'elle honore, *c. 23.* Il y a beaucoup de loix locales dans les diverses religions. Ainsi la loi des Indes défend de manger des vaches, qui ne multiplient que médiocrement dans leur pays, *c. 24.* Le cochon est très rare en Arabie, où il n'y a presque rien propre à la nourriture de ces animaux. La loi locale qui le défend est bon (*sic*). La chair de cochon que l'on mange, se transpire peu. Le défaut de transpiration forme ou aigrit les maladies de la peau. La nourriture du cochon doit donc être défendue dans les climats où l'on est sujet à ces maladies, comme celui de la Palestine, de l'Arabie, de l'Egypte, et de la Lybie. Il y a donc inconvénient de transporter une religion d'un pays à un autre, *c. 25.* Il faut éviter les loix pénales en fait de religion, il est plus sûr d'attaquer une religion par la faveur, par les commodités de la vie, par l'espérance de la fortune ; non pas par ce qui avertit, mais par ce qui fait qu'on oublie. En fait de changement de religion, les invitations sont plus fortes que les peines, *L. 25. c. 12.*

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(1) Jefferson has expressed somewhat similar views in the *Notes on Virginia, Query XIV. (M.E., II, 183–4)* : « I never yet saw a native American begging in the streets or highways. A subsistence is easily gained here ».

797. On ne doit point statuer par les loix divines ce qui doit l'être par les loix humaines ; ni régler par les loix humaines ce qui doit l'être par les loix divines, *L. 26. c. 2* (*1*). La loi civile ne doit pas être contraire à la loi naturelle, *c. 3.* Les loix de la religion ont plus pour objet la bonté de l'homme qui les observe, les loix civiles, la bonté morale des hommes en général. Ainsi les idées qui naissent immédiatement de la religion, ne doivent pas toujours servir de principe aux loix civiles ; parce que celles-ci en ont une autre, qui est le bien général de la société. La loi de Justinien qui mit parmi les causes de divorce le consentement du mari et de la femme d'entrer dans le monastère, s'éloignoit entièrement des principes des loix civiles. Il est naturel que les causes de divorce tirent leur origine de certains empêchements qu'on ne devoit pas prévoir avant le mariage : mais ce désir de garder la chasteté pouvoit être prévu, puisqu'il est en nous. Cette loi favorisa l'inconstance, dans un état qui, de sa nature, est perpétuel, *c. 9.* Les loix civiles défendent les mariages lorsque, par les usages reçus dans une certaine paix, ils se trouvent être dans les mêmes circonstances que ceux qui sont défendus par les loix de la nature ;

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(1) This again is one of the principles that Jefferson had most at heart. It was to make it recognized that he proposed the famous *Act for establishing Religious Freedom* adopted by the Virginia Assembly in 1786. But the American stasteman was far more categorical and aggressive than the French writer on this particular point : « Our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry... That truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debates, errors ceasing to be dangerous when it is permitted freely to contradict them. » *M.E., II, 300.*

et elles les permettent, lorsque les mariages ne se trouvent point dans ce cas. La défense des loix de la nature est invariable, parce qu'elle dépend d'une chose invariable ; le père, la mère et les enfans habitent nécessairement dans la maison. Mais les défenses des lois civiles sont accidentelles, parce qu'elles dépendent d'une circonstance accidentelle ; les cousins germains et autres habitant accidentellement dans la maison, *c. 14.* Posons pour maxime que lorsqu'il s'agit du bien public, le bien public n'est jamais que l'on prive un particulier de son bien, ou même qu'on lui en retranche la moindre partie par une loi ou un réglement politique. Dans ce cas, il faut suivre ; la rigueur la loi civile, qui est le palladium de la propriété. Ainsi lorsque le public a besoin du fonds d'un particulier, il ne faut jamais agir par la rigueur de la loi politique : mais c'est là que doit triompher la loi civile, qui, avec des yeux de même, regarde chaque particulier comme toute la cité même. Si le magistrat politique veut faire quelque édifice public, quelque nouveau chemin, il faut qu'il indemnise : le public est, à cet égard, comme un particulier qui traite avec un particulier. C'est bien assez qu'il puisse contraindre un citoyen de lui vendre son héritage, et qu'il lui ôte ce grand privilège qu'il tient de la loi civile, de ne pouvoir être forcé d'aliéner son bien, *c. 15.* On a pris une fausse idée de l'ostracisme. C'étoit une loi admirable qui prévenoit les mauvais effets que pouvoit produire la gloire d'un citoyen, en le comblant d'une nouvelle gloire, *c. 17.* Dans l'exercice de la police, c'est plutôt la loi qui punit, que le magistrat. Les matières de police sont des choses de chaque instant, et où il ne s'agit ordinairement que de peu : il ne faut donc guère de formalités. Les actions de la police sont promptes, et elle s'exerce sur des choses qui reviennent tous les jours : les grandes punitions n'y sont donc pas propres. Elle s'occupe perpétuellement de détails : les grands exemples ne sont donc point faits pour elle. Elle a plutôt des réglements que des loix. Les gens qui relèvent d'elle sont sans cesse sous les yeux des magistrats ; c'est donc la faute du magistrat, s'ils tombent dans des excès. Ainsi il ne faut pas confondre les grandes violations des loix avec la violation de la simple police : ces choses sont d'un ordre différent. L'action tant louée de cet empereur , qui fit empaler un boulanger qu'il avoit surpris en faute, est une action de sultan, qui ne sçait être juste qu'en outrant la justice même, *c. 24.*

798. La loi de l'ostracisme fut établie à Athènes, à Argos et à Syracuse. A. Syracuse, elle fit mille maux, parce qu'elle fut faite sans prudence. Les principaux citoyens se banissoient les uns les autres, en se mettant une feuille de figuier à la main ; de sorte que ceux qui avoient quelque mérite quittoient les offices. A Athènes, où le législateur avoit senti l'extension et les bornes qu'il devoit donner à sa loi, l'ostracisme fut une chose admirable : on n'y soumettoit jamais qu'une seule personne ; et il falloit un si grand nombre de suffrages, qu'il étoit difficile qu'on exilât quelqu'un dont l'absence ne fut pas nécessaire. On ne pouvoit bannir que tous les cinq ans. En effet, dès que l'ostrasisme ne devoit s'exercer que contre un grand personnage qui donneroit de la crainte à ses concitoyens, ce ne devoit pas être une affaire de tous les jours, *L. 29. c. 7*

799. La loi des douzes tables permettoit de tuer le voleur de nuit, aussi bien que le voleur de jour, qui, étant poursuivi, se mettoit en défense : mais elle voulut que celui qui tuoit le voleur criât, et appelât les citoyens, et c'est une chose que les loix, qui permettent de se faire justice soi-même, doivent toujours exiger. Une loi qui peut devenir si contraire à la sûreté et à la liberté des citoyens, doit être exécutée dans la présence des citoyens, *L. 29, c. 15.*

800. Choses à observer dans la composition des loix. Ceux qui ont un génie assez étendu pour pouvoir donner des loix à leur nation ou à une autre, doivent faire de certaines attentions sur la manière de les former. — Le style en doit être concis (1). Les loix des douze tables sont un modèle de précision ; les enfans les apprenoient par cœur. Les nouvelles de Justinien sont si diffuses, qu'il fallut les abréger. — Le style des loix doit être simple ; l'expression directe s'entend toujours mieux que l'expression réfléchie. Il n'y a point de majesté dans, les loix du bas-empire ; on y fait parler les princes comme des rhéteurs. Quand le style des loix est enflé, on ne les regarde que comme un ouvrage d'ostentation. — Il est essentiel que les paroles des loix réveillent chez tous les hommes les mêmes idées. La loi d'Honorius punissoit de mort celui qui achetoit, comme serf un affranchi, ou qui auroit voulu l'*inquiéter*. — Lorsque là loi doit faire quelque vexation, il faut, autant qu'on le peut, éviter de la faire à prix d'argent. On sçait l'histoire de cet (2) impertinent de Rome, qui donnoit des souflets à tous ceux qu'il rencontroit, et leur faisoit présenter les vingt-cinq sous de la loi des douze tables. Lorsque, dans une loi, l'on a bien fixé les idées des choses, il ne faut point revenir à des expressions vagues. Dans l'ordonnance criminelle de Louis XIV, après qu'on a fait l'énumération exacte des cas royaux, on ajoute ces mots : « et ceux dont de tous temps les juges royaux ont jugé : » ce qui fait rentrer dans l'arbitraire dont on venoit de sortir. — Les loix ne doivent point être subtiles, elles sont faites pour des gens de médiocre entendement : elles ne sont point un art de logique, mais la raison simple d'un père de famille. — Lorsque dans une loi, les exceptions, limitations, modifications, ne sont point nécessaires, il vaut beaucoup mieux n'en point mettre. De pareils détails jettent dans de nouveaux détails. — Il ne faut point faire de changement dans une loi, sans une raison suffisante. Justinien ordonna qu'un mari pourroit être répudié, sans que la femme perdit sa dot, si, pendant deux ans, il n'avoit pu consommer le mariage. Il changea la loi, et donna trois ans. — Lorsqu'on fait tant que de rendre raison d'une loi, il faut que cette raison soit digne d'elle. Une loi Romaine décide qu'un aveugle ne peut plaider, parce qu'il ne voit pas les erremens de la magistrature. — En fait de présomption, celle de la loi vaut mieux que celle de l'homme. La loi Françoise regarde comme frauduleux tous les actes faits par un marchand dans les dix jours qui ont précédé sa banqueroute : c'est la présomption de la loi. La loi Romaine infligeoit des peines au mari qui gardoit sa femme après l'adultère, à moins qu'il n'y fut déterminé par la crainte de l'événement d'un procès, ou par la négligence de sa propre honte ; et c'est la présomption de l'homme. Il falloit que le juge présumât les motifs de la conduite du mari. Lorsque le juge présume, les jugemens deviennent arbitraires ; lorsque la loi présume, elle donne au juge une règle fixe. — Comme les loix inutiles affoiblissent les loix nécessaires, celles qu'on peut éluder affoiblissent la législation. Une loi doit avoir son effet, et il ne faut pas permettre d'y déroger par une convention particulière. — Il faut prendre garde que les loix soient conçues de manière qu'elles ne choquent point la nature des choses. Philippe II promet à celui qui tuera le prince d'Orange de donner à lui, ou à ses héritiers *25.000* écus, et la *Noblesse.* — Il faut dans les loix, une certaine candeur. Faites pour punir la méchanceté des hommes, elles doivent avoir elles-mêmes la plus grande innocence, *L. 29. c. 16.*

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(1) Jefferson was guided by the same principles in his revision of the laws of Virginia : « The same matter, if couched in the modern Statutory language, with all its tautologies, redundancies, and circumlocutions, would have spread itself over many pages, and been unintelligible to those whom it most concerns. Indeed, I wished to exhibit a sample of reformation in the barbarous style into which modern statutes have degenerated from their ancient simplicity ». *To George Wythe, Novembre 1st 1878, M. E., I, 216.*

(2) *The act of the Virginia assembly to punisch profane swearing has been shewn ridiculous by similar instances. Note of Jefferson.*

801. Il y a de certaines idées d'uniformité qui saisissent quelquefois les grands esprits, mais qui frappent infailliblement les petits. Ils y trouvent un genre de perfection qu'ils reconnoissent, parce qu'il est impossible de ne le pas découvrir ; les mêmes poids dans la police, les mêmes mesures dans le commerce, les mêmes loix dans l'état, la même religion dans toutes ses parties. Mais cela est-il toujours à propos, sans exception ? Le mal de changer est-il toujours moins grand que le mal de souffrir ? (1) et la grandeur du génie ne consisteroit elle pas mieux à sçavoir dans quel cas il faut l'uniformité, et dans quel cas il faut des différences ? *L. 29, c. 18.*

802. Aristote vouloit satisfaire, tantôt sa jalousie contre Platon, tantôt sa passion pour Alexandre. Platon étoit indigné contre la tyrannie du peuple d'Athènes. Machiavel étoit plein de son idole, le duc de Valentinois. Thomas More, qui parloit plutôt de ce qu'il avoit lu que de ce qu'il avoit pensé, vouloit gouverner tous les actes avec la simplicité d'une ville Grecque. Arrington ne voyoit que la république d'Angleterre, pendant qu'une foule d'écrivains trouvoient le désordre par-tout où ils ne voyoient point de couronne, *L. 29, c. 19.*

803. The object upon which our elective power acts, is remarkeably different from that of the Romans. They elected their chief officers, and particularly the consuls, or those who were vested with the executive authority, whom they changed annually, but the Senate, where the principal power in their state was lodged, was a more

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(1) Jefferson has expressed a similar distrust of uniformity during all his life : « Subject opinion to coercion : whom will you make your inquisitors ? Fallible men : men governed by bad passions ? And why subject it to coercion ? To produce uniformity. But is uniformity of opinion desirable ? No more than that of face or stature ». *Notes on Virginia, Query XVII, I, 223.* Thirty years later he wrote to Samuel Kercheval : « Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with,... but I know also, that laws and institutions must go hand in hand with the progress of the human mind ». *July 12, 1816., M.E., XV, 41.*

fixed body of men ; and not subject to the elective power of the people. Our Saxon forefathers almost reversed this principle ; for they made their Wittenagemot or parliament, where their principal power was lodged, annually moveable, and entirely subject to the elective power of the people ; and gave a more fixed state to the executive authority. This last they confined within a certain sphere of action, prescribed by the law, so that it could not operate to the injury of any individual, and was controulable by the parliament. *Historical essay on the English constitution. ch. 1. par. 6* (1).

804. Nature herself has confined, or limited, the number of men in all societies that meet together to inform and be informed by argument and debate, within the natural powers of hearing and speech. *ib. c. 2. s. 2. pa. 24.*

805. Before the parliament tendered the crown to king William they made a declaration, the thirteenth article of which is « that for redress of grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently ». What they intended posterity should understand by the word « frequently » is hard to determine. It appears however that they meant to usurp a power, in the legislative authority, to determine how often the people should exercise their elective rights, for, soon after, they made an act by which our kings were obliged to call and disolve their parliaments once in three years at least : thus usurping a power in themselves of restraining the elective power of the people by acts of parliament. In the following reign the parliament made a law for a landed qualification of the members of the house of

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(1) *An historical Essay on the English Constitution ; or an impartial inquiry into the elective power of the people, from the first establisment of the Saxons in this Kingdom*, London, E. and. C. Dilly, 1771, 8° VIII, 210 pp. Anonymous, listed under « Allan Ramsay jr " in the Library of Congress Catalogue.

commons, enacting that every member for a county, should be possessed of an estate in land of ₤ *600* a year, and for a borough, of ₤ *300* a year. Thus has been our free constitution and mode of government been converted into a down right rank aristrocracy, of the rich in land. Our antient parliaments were composed of « the wise men of England » but since the enacting these laws they have been changed into the « rich men of England » which has made a vast difference in the spirit of the laws that proceed from there. *ib. c. 7 p. 125.*

806. In ogni delitto si deve fare dal giudice un sillogismo perfetto ; la maggiore dev'essere la legge generale; la minore l'azione conforme, o no alla legge ; la conseguenza, la libertà, o la pena. Quando il giudice sia costretto, o voglia fare anche soli due sillogismi si apre la porta all'incertezza. Non v'è cosa più pericolosa di quell'assioma comune, che bisogna consultare lo spirito della legge. Questo è un argine rotto al torrente delle opinioni. Questa verità, che sembra un paradosso alle menti volgari, più percosse da un piccol disordine presente, che dalle funeste, ma remote conseguenze, che nascono da un falso principio radicato in una nazione, mi sembra dimostrata. Le nostre cognizioni, e tutte le nostre idee hanno una reciproca connessione ; quanto più sono complicate, tanto più numerose sono le strade che ad esse arrivano, e partono. Ciascun uomo ha il suo punto di vista, ciascun uomo in differenti tempi ne ha un diverso. Lo spirito della legge sarebbe dunque il risultato di una buona, o cattiva logica di un giudice di una facile, o malsana digestione ; dipenderebbe dalla violenza delle sue passioni, dalla debolezza di chi soffre, dalle relazioni del giudice coll'offeso, e da tutte quelle minime forze, che cangiano le apparenze di ogni oggetto nell'animo fluttuante del l'uomo.— Un disordine, che nasce dalla rigorosa osservanza della lettera di una legge penale non è da mettersi in confronto coi disordini, che nascono della interpretazione. Un tal momentaneo inconveniente spinge a fare la facile e necessaria correzione alle parole della legge, che sono la cagione dell'incertezza; ma impedisce la fatale licenza di ragionare, da cui nascono le arbitrarie, e venali controversie. *Beccaria, dei delitti e delle pene. c. 4* (1).

807. Non solamente è interesse comune, che non si commettano delitti, ma che siano più rari a proporzione del male, che arrecano alla società. Dunque più forti debbono essere gli ostacoli, che risospingono gli uomini dai delitti a misura che sono contrari al ben pubblico, eda misura delle spinte, che gli portano ai delitti. Dunque vi deve essere una proporzione fra i delitti, e le pene. — Data la necessità della riunione degli uomini, dati i patti, che necessariamente risultano dalla opposizione medesima degl'interessi privati, trovasi una scala di disordini, dei quali il primo grado consiste in quelli, che distruggono immediatamente la società, e l'ultimo nella minima ingiustizia possibile fatta ai privati membri di essa. Tra questi estremi sono comprese tutte le azioni opposte al ben pubblico, che chiamansi delitti, e tutte vanno per gradi insensibili, decrescendo dal più sublime al più infimo. Se la geometria fosse adattabile alle infinite, ed oscure combinazioni delle azioni umane, vi dovrebbe essere una scala corrispondente di pene, che discendesse dalla più forte alla più debole; ma basterà al saggio legislatore di segnarne i punti principali, senza turbar l'ordine, non decretando ai delitti del primo grado le pene dell'ultimo. — Se una pena eguale è destinata a due delitti, che disugualmente offendano la società, gli uomini non troveranno un più forte ostacolo per commettere il maggior delitto, se con esso vi trovino unito un maggior vantaggio. *Beccaria* § *6.*

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(1) Commenting upon the revision of the laws of Virginia, Jefferson paid the following tribute to Beccaria in his *Autobiography* : « Beccaria and other writers on crimes and punishment had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death... The Revisors had adopted their opinions : but the general idea of our country had not yet advanced to that point. *M.E., I, 67.* See also his letter to G. Wythe, *November, 1st, 1778, M.E., II, 216.*

808. L'unica e vera misura dei delitti è il danno fatto alla nazione; e però errarono coloro che credettero vera misura dei delitti l'intenzione di chi gli commette. Questa dipende dalla impressione attuale degli oggetti, e dalla precedente disposizione della mente: esse variano in tutti gli uomini, e in ciascun uomo, colla velocissima successione delle idee, delle passioni, e delle circostanze. Sarebbe dunque necessario formare non solo un codice particolare per ciascun cittadino, ma una nuova legge ad ogni delitto. Qualche volta gli uomini colla migliore intenzione fanno il maggior male alla società: e alcune altre volte colla più cattiva volontà ne fanno il maggior bene. — Alcuni pensarono che la gravezza del peccato entrasse nella misura dei delitti. Se il legislatore e giudice perfetto ha stabilito pene eterne a chi disobbedisse alla sua onnipotenza, qual sara l'insetto che oserà supplire alla divina giustizia, che verrà vendicare l'Essere che basta a sè stesso, che non può ricevere dagli oggetti impressione alcuna di piacere o di dolore, e che solo tra tutti gli Esseri agisce senza reazione? La gravezza del peccato dipende dalla imperscrutabile malizia del cuore. Questa, da Esseri finiti, non può senza rivelazione sapersi. Come dunque da questa si prenderà norma per punire i delitti? Potrebbono in questo caso gli uomini punire quando Iddio perdona, e perdonare quando Iddio punisce. § 7.

809. Alcuni delitti distruggono immediatamente la società, o chi la representa; alcuni offendono la privata sicurezza di un cittadino nella vita, nei beni, o nell'onore: alcuni altri sono azioni contrarie a ciò che ciascuno è obbligato dalle leggi di fare, o non fare, in vista del ben pubblico § *8.* Tra i delitti della terza specie sono particolarmente quelli, che turbano la pubblica tranquillità, e la quiete de' cittadini, come gli strepiti, e i bagordi nelle pubbliche vie destinate al commercio, ed al passaggio de' cittadini, come if anatici sermoni, che eccitano le facili passioni della curiosa moltitudine. § *11.*

810. L'opinione, che ciaschedun cittadino deve avere di poter fare tutto ciò, che non è contrario alle leggi, senza temerne altro inconveniente che quello che può nascere dall' azione medesima, questo è il dogma politico che dovrebb' essere sacro, senza di cui non vi può essere legitima società. § *8.*

811. Se i censori, e in genere i magistrati arbitrari, sono necessari in qualche governo, ciò nasce dalla debolezza della sua costituzione, e non dalla natura di governo bene organizzato. § *11.*

812. Vi è un teorema generale molto utile a calcolare la certezza di un fatto, per esempio la forza degl'indizi di un reato. Quando le prove di un fatto sono dipendenti l'una dall'altra, cioè quando gl'indizi non si provano che tra di loro, quanto maggiori prove si adducono, tanto è minore la probabilità del fatto, perchè i casi che farebbero mancare le prove antecedenti, fanno mancare le susseguenti. Quando le prove sono indipendenti, l'una dell'altra, cioè, quando gli indizi si provano altronde che da se stesse, quanto maggiori prove si adducano, tanto più cresce la probabilità del fatto, perchè la fallacia di una prova non influisce sull'altra. Io parlo di probabilità in materia di delitti, che per meritar pena debbono esser certi. Ma rigorosamente la certezza morale non è che una probabilità, ma probabilità tale che è chiamata certezza, perchè ogni uomo di buon senso vi acconsente necessariamente per una consuetudine nata dalla necessità di agire, ed anteriore ad ogni speculazione. La certezza, che si richiede per accertare un uomo reo è dunque quella, che determina ogni uomo nelle operazioni più importanti della vita. Ma questa morale certezza di prove è più facile il sentirla, che l'esattamente definirla. Perciò io credo ottima legge quella, che stabilisce assessori al giudice principale, presi dalla sorte, e non dalla scelta, perche in questo caso è più sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Ella è utilissima legge quella, che ogni uomo sia giudicato dai suoi pari, perchè dove si tratta della libertà e della fortuna di un cittadino, debbono tacere quei sentimenti che inspira (*sic*) la disuguaglianza ; e quello sdegno, con cui l'inferiore guarda il superiore, non possono agire in questo giudizio. Ma quando il delitto sia un' offesa di un terzo, allora i giudici dovrebbono essere, metà pari del reo, metà pari dell'offeso. — Egli è ancora conforme alla giustizia, che il reo escluder possa fino ad un certo segno coloro, che gli sono sospetti ; e ciò concessogli senza contrasto per alcun tempo, sembrerà quasi chè il reo si condanni da sè stesso. Pubblici siano i giudizi, e pubbliche le prove del reato, perchè l'opinione, che è forse il solo cemento delle società, imponga un freno alla forza, ed alle passioni, perchè il popolo dica noi non siamo schiavi, e siamo difesi. § *14.*

813 (1). Una contradizione fralle leggi, e i sentimenti naturali all'uomo, nasce dai giuramenti, che si esigono dal reo, acciocchè sia un uomo veridico, quando ha il massimo interesse di esser falso ; quasi che l'uomo potesse giurar da dovero di contribuire alla propria distruzione. Quanto sieno inutili i giuramenti lo ha fatto vedere l'esperienza, perchè ciascun giudice mi può esser testimonio, che nessun giuramento ha mai fatto dire la verità ad alcun reo ; lo fa vedere la ragione, che dichiara inutili, e per conseguenza dannose tutte le leggi, che si oppongono ai naturali sentimenti dell'uomo. § *19.*

814 (2) Quanto la pena sarà più pronta, e piu vicina al delitto commesso, ella sarà tanto più giusta e tanto più utile ; perchè quanto è minore la distanza del tempo che passa tra la pena ed il misfatto, tanto è più forte e più durevole nell'animo umano l'associazione di queste due idee, *Delitto*, e *Pena*, talchè insensibilmente si considerano, uno come cagione, e l'altra come effetto necessario immancabile. Il lungo ritardo non produce altro effetto, che di sempre più disgiungere queste due idee, e quantunque faccia impressione il castigo d'un delitto lo fa meno come castigo che come spettacolo, e non lo fa che dopo indebolito negli animi degli spettatori l'orrore di un tal delitto particolare, che servirebbe a rinforzare il sentimento della pena. Un altro principio serve mirabilmente a stringere sempre più l'importante connessione tra'l misfatto e la pena; cioè che questa sia conforme quanto più si possa alla natura del delitto. Questa analogia facilita mirabilmente il contrasto, che dev' essere tra la spinta al delitto e la ripercussione della pena. §-*19* (1)

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(1) Dei Giuramenti. *Marginal note of Jefferson.*

(2) Prontezza della Pena. *Marginal note of Jefferson.*

815. (2) Altri delitti sono attentati contro la persona, altri contro le sostanze. I primi debbono infallibilmente esser puniti con pene corporali : nè il grande, nè il ricco debbono poter mettere a prezzo gli attentati contro il debole, ed il povero ; altrimenti le ricchezze diventano l'alimento della tirannia. Non vi è libertà ogni qual volta le leggi permettono, che in alcuni eventi l'uomo cessi di esser persona, e diventi cosa : questa scoperta è il magico segreto, che cangia i cittadini in animali di servigio, che in mano del forte è la catena, con cui lega le azioni degl'incauti, e dei deboli. § *20*. Quali saranno dunque le pene dovute ai delitti dei Nobili ? Esser debbono le medesime per il primo, e per l'ultimo cittadino. A chi dicesse che la medesima pena data al

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(1) *Beccaria* 19, quoted as authority in a note to the following article of the *Bill proportioning Crimes* and punishments: « Whenever sentence of death shall have been pronounced against any person for treason or, murder, execution shall be done on the next day but one after such sentence, unless it be Sunday, and then on the Monday following ». It may be noted that Beccaria does not mention the eventuality of postponing over Sunday the execution of a criminal, but insists solely upon the desirability of carrying out the sentence a short time after judgment has been passed.

(2) Violenze, *Marginal note of Jefferson.*

Nobile, ed al Plebeo, non è realmente la stessa per la diversità dell'educazione, per l'infamia che spandesi su di un'illustre famiglia, risponderei, che la sensibilità del reo non è la misura delle pene, ma il pubblico danno tanto maggiore, quanto è fatto da chi è più favorito; che l'uguaglianza delle pene non può essere che estrinseca, essendo realmente diversa in ciascun individuo. § *21.*

816. (1) I furti che non hanno unito violenza dovrebbero esser puniti con pena pecuniaria. Chi cerca d'arricchirsi dell'altrui, dovrebbe esser punito *con pena pecuniaria* (2), impoverito del proprio. Ma come questo non è per l'ordinario, che il delitto della miseria e della disperazione, la pena più opportuna sarà quell'unica sorta di schiavitù che si possa chiamar giusta, cioè la schiavitù per un tempo delle opere, e della persona alla comune società, per risarcirla colla propria, e perfetta dipendenza, dell'ingiusto dispotismo usurpato sul patto sociale. Ma quando il furto sia misto di violenza, la pena dev' essere parimenti un misto di corporale e di servile. § *22.*

817. (3) Li ingiurie personali e contrarie all'onore debbono essere punite coll'infamia. Quest'infamia è un segno della pubblica disapprovazione, che priva il reo de' pubblici voti, della confidenza della patria, è di quella quasi fraternità, che la società inspira. Ella non è in arbitrio della legge. Chi dichiara infami azioni, per se indifferenti, sminuisce l'infamia delle azioni, che son veramente tali. Le pene d'infamia non debbono essere nè troppo frequenti, nè cadere sopra un gran numero di persone in una volta : non il primo, perchè gli effetti reali, e troppo frequenti delle cose d'opinione indeboliscono la forza della opinione medesima ; non il secondo, perchè l'infamia di molti si risolve nella infamia di nessuno. La pene corporali, e dolorose non devono darsi a quei delitti che fondati sull'orgoglio, traggono, dal dolore istesso, gloria ed alimento, ai quali convengono il ridicolo, e l'infamia, pene che frenano l'orgoglio dei fanatici coll'orgoglio degli spettatori, e dalla tenacità delle quali, appena con lenti, ed ostinati sforzi la verità stessa si libera, § *23.*

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(1) Furti, *Marginal note of Jefferson.*

(2) Erased in the manuscript.

(3) Infamia, *Marginal note of Jefferson.*

818. (*1*) Chi turba la tranquillità pubblica, chi non ubbidisce alle leggi, quegli dev' esser escluso dalla società, cioè dev'esser bandito. — Sembra che il bando dovrebbe esser dato a coloro i quali accusati di un atroce delitto hanno una grande probabilità, ma non la certezza contro di loro di esser rei ; ma per ciò fare è necessario uno statuto il meno arbitrario, e il più preciso, che sia possibile, il quale condanni al bando chi ha messo la nazione nella fatale alternativa o di temerlo, o di offenderlo, lasciandogli però il sacro diritto di provare l'innocenza sua. Maggiori dovrebbon essere i motivi contro un nazionale, che contro un forestiere, contro un incolpato per la prima volta, che contra chi lo fu più volte. §. *24.* Ma chi è bandito, ed escluso per sempre dalla società, di cui era membro, dev' egli esser privato dei suoi beni ? Vi debbono essere alcuni casi, in cui proporzionatamente a' delitti, vi sia la perdita di tutto, o di parte dei beni, ed alcuni nò. I beni tolti al reo dovessero [*sie*] toccare ai legittimi successori, piuttosto che al principe. — Qual più triste spettacolo che una famiglia strascinata all' infamia ed alla miseria, dai delitti di un capo, alla quale la sommissione ordinata dalle leggi impedirebbe il prevenirgli, quan d'anche vi fossero i mezzi per farlo. § *25.*

819. (2) Uno dei più gravi freni dei delitti non è la crudeltà delle pene, ma l'infallibilità di esse, e per conseguenza la vigilanza dei magistrati, e quella severità di un giudice inesorabile, che per essere un' utile virtù, dev' essere accompagnata da una dolce legislazione. La

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(1) Bando, *Marginal note of Jefferson.*

(2) Dolcezza e Infallibilità della pena. *Marginal note of Jefferson.*

certezza di un castigo, benchè moderato, farà sempre una maggiore impressione, che il timore di un altro più terribile, unito colla speranza dell'impunità; perchè i mali, anche minimi, quando son certi, spaventano sempre gli animi umani, e la speranza, dono celeste, che sovente ci tien luogo di tutto, ne allontana sempre l'idea dei maggiori, massimamente quando l'impunità, che l'avarizia e la debolezza spesso accordano, ne aumenti la forza. L'atrocità stessa della pena fa, che si ardisca tanto di più per ischivarla, quanto è grande il male, a cui si va incontro; fa che si commettano più delitti per fuggir la pena di un solo. I paesi, e i tempi dei più atroci supplici, furon sempre quelli delle più sanguinose ed inumane azioni, poichè il medesimo spirito di ferocia, che guidava la mano del legislatore, reggeva quella del Parricida, e di Sicario. A misura che i supplici diventano piu crudeli, gli animi umani, che come i fluidi si mettono sempre a livello cogli oggetti che gli circondano, s'incalliscono; e la forza sempre viva delle passioni fa, che dopo cent' anni di crudeli supplici, la ruota spaventi tanto, quanto prima la prigionia. Perchè una pena ottenga il suo effetto, basta che il male della pena ecceda il bene, che nasce dal delitto, e in questo eccesso di male dev'essere calcolata l'infallibilità della pena, e la perdita del bene, che il delitto produrrebbe: tutto il di più è dunque superfluo e perciò tirannico. Gli uomini si regolano per la ripetuta azione dei mali, che conoscono, e non su quelli, che ignorano. Si facciano due nazioni, in una delle quali, nella scala delle pene, proporzionata alla scala dei delitti, la pena maggiore sia la schiavitù perpetua, e nell'altra la ruota; io dico, che la prima avrà tanto timore della sua in maggior pena, quanto la seconda. Due altre funeste conseguenze derivano dalla crudeltà delle pene, contrarie al fine medesimo di prevenire i delitti. La prima è, che non è si facile il serbare la proporzione essenziale tra il delitto, e la pena, perchè, quantunque un'industriosa crudeltà ne abbia variate moltissimo le specie, pure non possono oltrepassare quell'ultima forza, a cui è limitata l'organizzazione, e la sensibilità umana. Giunto che si sia a questo estremo non si troverebbe a' delitti più dannosi, e più atroci, pena maggiore corrispondente come sarebbe d'uopo per prevenirgli. L'altra conseguenza è, che la impunità stessa nasce dall' atrocità dei supplici. Gli uomini sono racchiusi fra certi limiti, sì nel bene, che nel male ; ed uno spettacolo troppo atroce per l'umanità, non può essere che un passeggiero furore ma non mai un sistema costante, quali debbono essere le leggi ; che se veramente son crudeli, o si cangiona, o l'impunità fatale nasce dalle leggi medesime. § *27*.

820 Alcuni hanno sostenuto, che in qualunque luogo commettasi un delitto, cioè un azione contraria alle leggi, possa essere punito ; quasi che il carattere di suddito fosse indelebile, cioè sinonimo, anzi peggiore di quello di schiavo ; quasi che uno potesse esser suddito di un dominio, ed abitare in un altro, e che le di lui azioni potessero senza contraddizione esser subordinate a due sovrani, e a due codici sovente contraddittori. Alcuni credono parimente, che un'azione crudele fatta, per esempio, a Costantinopoli possà esser punita a Parigi, per l'astratta ragione, che chi offende l'umanità merita di avere tutta l'umanità inimica, e l'esecrazione universale ; quasi che i giudici, vindici fossero della sensibilità degli uomini, e non piuttosto dei patti che gli legano tra di loro. Il luogo della pena è il luogo del delitto, perchè ivi solamente e non altrove, gli uomini sono sforzati di offendere un privato per prevenire l'offesa pubblica. Le leggi sono vindici dei patti, non della malizia intrinseca delle azioni. § *29*.

821. L'adulterio è un delitto, che considerato politicamente ha la sua forza, e la sua direzione da due cagioni ; le leggi variabili degli uomini, e quella fortissima attrazione, che spinge un sesso verso l'altro ; è un[a] differenza considerabile fra questo e gli altri delitti. Egli nasce dall'abuso di un bisogno costante, ed universale, a tutta l'umanità, bisogno anteriore, anzi fondatore della società medesima, laddove gli altri delitti distruttori di essa, hanno un'origine più determinata da passioni momentanee, che da un bisogno naturale. La fedeltà conjugale è sempre proporzionata al numero, ed alla libertà de' matrimoni. L'azione di un tal delitto è così instantanea, e misteriosa, così coperta da quel velo medesimo, che le leggo hanni posto : velo necessario, ma fragile, e che aumenta il pregio della cosa, in vece di scemarlo ; le occasioni così facili, le conseguenze così equivoche, che è più in mano del legislatore il prevenirlo, che correggerlo. Regola generale : in ogni delitto, che per sua natura dev' essere il più delle volte impunito, la pena diviene un incentivo. — L'Attica Venere (1) ha meno il suo fondamento sui bisogni dell'uomo isolato e libero, che sulle passioni dell' uomo sociabile e schiavo. Essa prende la sua forza non tanto dalla sazietà dei piaceri, quanto da quella educazione, che comincia per render gli uomini inutili a se stessi per fargli utili ad altri ; in quelle case, dove si condensa l'ardente gioventù, dove essendovi un argine insormontabile ad ogni altro commercio, tutto il vigore della natura, che si sviluppa, si consuma inutilmente per l'umanità, anzi ne anticipa la vecchiaia. — L'infanticidio è parimente l'effetto di una inevitabile contraddizione, in cui è posta una persona, che per debolezza, o per violenza abbia caduto. Chi trovasi tra l'infamia, e la morte di un essere incapace di sentirne i mali, come non preferirà questa alla miseria infallibile, a cui sarebbero esposti ella e l'infelice frutto ? La miglior maniera di prevenire questo delitto sarebbe di proteggere con leggi efficaci la debolezza contro la tirannia, la quale esagera i vizi, che non possono coprirsi col manto della virtù. Non si può chiamare giusta (il che vuol dire necessaria) una pena di un delitto, finchè la legge non ha adoperato il miglior mezzo possibile nelle date circostanze d'una nazione per prevenirlo. *Beccar.* § *31* (1)

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(1) « Whosoever shall be guilty of Rape, Polygamy, or Sodomy with man or woman... *Bill for proportioning* ; *Beccaria* 31, given as authority in note ; but in Jefferson the argumentation is purely legal.

822. (2) Il suicidio è un delitto che sembra non poter ammettere una pena propriamente detta ; poichè ella non può cadere, che e su gl'innocenti, o su di un corpo freddo ed insensibile. Se questa non farà alcuna impressione su i viventi, come non lo farebbe lo sferzare una statua. Gli uomini amano troppo la vita, e tutto ciò che gli circonda perchè temer si debba, che la necessaria impunità di un tal delitto abbia qualche influenza sugli uomini. Chi teme il dolore ubbidisce alle leggi, ma la morte ne estingue nel corpo tutte le sorgenti. Qual dunque sarà il motivo, che tratterrà la mano disperata del suicida ? Se alcuno si opponesse che una pena che cade sulla di lui famiglia può nondimeno ritrarre un uomo determinato dall'uccidersi ; io rispondo, che chi tranquillamente rinuncia al bene della vita, che odia l'esistenza quaggiù, talchè vi preferisce un'infelice eternità, deve essere niente mosso dalla meno efficace, è piu lontana considerazione dei figli, o dei parenti. § *32* (2).

823. La questione e, se sia utile, o dannoso alla nazione il lasciare una perpetua libertà di assentarsi a ciascun membro di essa. Ogni legge, che non sia armata, o che la natura delle circostanze rende insussistente, non deve promulgarsi. Le leggi inutili disprezzate dagli uomini, communicano il lore avvilimento alle leggi anche più salutari, che sono risguardate più come un ostacolo da superarsi, che il deposito del publico bene. Una legge che fa dello stato una prigione è inutile, perchè, a meno che scogli inaccessibili, o mare innavigabile, non dividano un paese da tutti gli altri, come chiudere tutti i punti della circonferenza di esso, e come custodire i custodi ? Chi tutto trasporta, non può, dacche lo ha fatto, esserne punito. Un tal delitto subito che è commesso non può più punirsi, e il punirlo prima, è punire la volontà degli uomini, e non le azioni ; egli è un comandare all' intenzione, parte liberissima dell'uomo dall'impero delle umane leggi. Il punire l'assente nelle sostanza lasciatevi, oltre la facile, ed inevitabile collusione, che senza tiranneggiare i contratti non può esser tolta, arrenerebbe ogni commercio da nazione a nazione. Il punirlo, quando ritornasse il reo, sarebbe l'impedire, che si ripari il mal fatto alla società, col rendere tutte le assenze perpetue. La proibizione stessa di sortire da un paese aumenta il desiderio ai nazionali di sortirne, ed è un avvertimento ai forestieri di non introdurvisi. Che dovremo pensare di un governo, che non ha altro mezzo per trattenere gli uomini, naturalmente attaccati per le prime impressioni dell'infanzia, alla loro patria, fuori che il timore ? La più sicura maniera di fissare i cittadini nella patria è di aumentare il benessere relativo di ciascheduno. La sicurezza, e la libertà limitata dalle sole leggi sono quelle che formano la base principale di questa felicità, § *32*.

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(1) If a person commit petty treason, or a husband murder his wife, a parent his child »..... *Bill for proportioning Crimes and Punishments.....* In a long note to this article of the law, Jefferson gives as his authority *Beccaria* 31. However he is more concerned with the difficulty of obtaining evidence in such cases than with the humanitarian principle developped by Beccaria, and as a matter of fact does not reproduce his argumentation at all.

(2) Suicidio, *Marginal note of Jefferson.* « In other cases of homicide, the law will not add to the miseries of the party, by punishments and forfeitures ». *Bill for proportioning Crimes and Punishment.* Beccaria 32, given as authority in a note.

824. (1) La buona fede dei contratti, la sicurezza del commercio costringono il Legislatore ad assicurare ai creditori le persone dei debitori falliti ; ma io credo importante il distinguere il fallito doloso, dal fallito innocente ; il primo dovrebbe esser punito coll'istessa pena che è assegnata ai falsificatori delle monete, poichè il falsificare un pezzo di metallo coniato, che è un pegno delle obbligazioni dei cittadini non è maggior delitto, che il falsificare le obbligazioni stesse. Ma il fallito innocente, ma colui che dopo un rigoroso esame ha provato innanzi a' suoi giudici, che o l'altrui malizia, o l'altrui disgrazia, o vicende inevitabili della prudenza umana, lo hanno spogliato delle sue sostanze, per qual barbare motivo dovrà essere gettato in una prigione privo dell'unico, e tristo bene che gli avanza di una nuda libertà a provar le angosce dei colpevoli, e colla disperazione della probità oppressa a pentirsi forse di quella innocenza colla quale vivea tranquillo sotto la tutela di quelle leggi, che non era in sua balia di non offendere. Potrebbesi distinguere il dolo dalla colpa grave, la grave dalla leggiera, e questa dalla perfetta innocenza, ed assegnando al primo le pene dei delitti di falsificazione, alla seconda minori, ma con privazione di libertà, riservando all' ultima la scelta libera dei mezzi di restabilirsi, togliere alla terza la libertà di farlo, lasciandola ai creditori. Ma le distinzioni di grave, e di leggiero debbon fissarsi dalla cieca ed imparzial legge, non dalla pericolosa ed arbitraria prudenza dei giudici. — Il commercio, la proprietà dei beni non sono un fine del patto sociale, ma possono esser un mezzo per ottenerlo. L'esporre tutt' i membri della società ai mali per cui tante combinazioni vi sono per farli nascere, sarebbe un subordinare i fini ai mezzi, paralogismo di tutte le scienze, e massimamente della politica, nel quale son caduto nelle precedenti edizioni, ove dicea, che il fallito innocente dovesse esser custodito come un pegno de' suoi debiti, o adoperato come schiavo al lavoro per i creditori. Ho vergogna di avere scritto così. § *34*.

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(1) Debitori, *Note of Jefferson.*

825. (1) Se gli asili siano giusti, e se il patto di rendersi fralle nazioni reciprocamente i rei, sia utile, or no ? Dentro i confini di un paese non dev' esservi alcun luogo indipendente dalle leggi. La forza di esse seguir deve ogni cittadino, come l'ombra segue il corpo. L'impunità, e l'asilo non differiscono, che di più, e meno, e come l'impressione della pena consista più nella sicurezza d'incontrarla, che nella forza di essa, gli asili invitano più ai delitti di quello, che le pene non allontanano. Moltiplicare gli asili è il formare tante piccole sovranità, perchè dove non sono leggi che comandano, ivi possono formarsene delle nuove, ed opposte alle comuni, e però uno spirito opposto a quello del corpo intiero della società. Tutte le istorie fanno vedere che dagli asili sortirono grandi rivoluzioni negli stati, e nelle opinioni degli uomini. Ma, se sia utile il rendersi reciprocamente i rei fralle nazioni, io non ardirei decidere questa questione, finchè le leggi più conformi ai bisogni dell'umanità le pene più dolci, ed estinta la dipendenza dall'arbitrio, e dall'opinione, non rendano sicura l'innocenza oppressa, e la detestata virtù : quantunque la persuasione di non trovare un palmo di terra, che perdoni ai veri delitti, sarebbe un mezzo efficacissimo per prevenirli. *Beccar.* § *35.*

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(1) Asili, *Note of Jefferson.*

826 (1). Se sia utile il mettere a prezzo la testa di un uomo conosciuto reo, ed armando il braccio di ciascun cittadino, farne un carnefice. O il reo è fuori de' confini, o al di dentro. Nel primo caso il Sovrano stimola i cittadini a commettere un delitto, e gli espone ad un supplicio, facendo così un'ingiuria, ed una usurpazione d'autorità negli altrui domini, ed autorizza in questa maniera le altre nazioni a far lo stesso con lui : nel secondo, mostra la propria debolezza. Chi ha la forza per difendersi non cerca di comprarla. Di più, un tal editto sconvolge tutte le idee di morale, e di virtù, che ad ogni minimo vento svaniscono nell'animo umano. Ora le leggi invitano al tradimento, ed ora lo puniscono. Con una mano il legislatore stringe i legami di famiglia, di parentela, di amicizia, e coll'altra premia chi gli rompe, e chi gli spezza : sempre contradditorio a se medesimo, ora invita alla fiducia gli animi sospetti degli uomini, ora sparge la diffidenza in tutti i cuori, invece di prevenire un delitto, ne fa nascer cento. Questi sono gli espedienti delle nazioni deboli, le leggi delle quali non sono, che istantanee riparazioni di un edificio rovinoso, che crolla da ogni parte. *Beccaria.* § *36.*

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(1) Della Taglia. *Note of Jefferson.*

827 (1). Perchè le leggi non puniscono l'intenzione, non è però che un delitto, che cominci con qualche azione, che ne manisfesti la volontà di eseguirlo, non meriti una pena benchè minore all' esecuzione medesima del delitto. L'importanza di prevenire un attentato autorizza una pena ; ma siccome tra l'attentato, e l'esecuzione vi può essere un intervallo ; così la pena maggiore riserbata al delitto consumato può dar luogo al pentimento. Lo stesso dicasi quando siano più complici di un delitto, e non tutti esecutori immediati, ma per una diversa ragione. Quando più uomini si uniscono in un rischio, quanto egli sarà più grande, tanto più cercano che sia uguale per tutti ; sarà dunque più difficile trovare chi si contenti d'esserne l'esecutore, correndo un rischio maggiore degli altri complici. La sola eccezione sarebbe nel caso che all'esecutore fosse fissato un premio ; avendo egli allora un compenso per il maggior rischio, la pena dovrebbe esser eguale. Tali riflessioni sembreran troppo metafisiche a chi non rifletterà essere utilissimo, che le leggi procurino meno motivi di accordo che sia possibile tra i compagni di un delitto. Alcuni tribunali offrono l'impunità a quel complice di grave delitto che paleserà i suoi compagni. Un tale spediente ha i suoi inconvenienti, e i suoi vantaggi. Gl' inconvenienti sono, che la nazione autorizza il tradimento, detestabile ancora fra gli scellerati, perchè sono meno fatali ad una nazione i delitti di coraggio, che quegli di viltà, perchè il primo non è frequente, perchè non aspetta che una forza benefica, e direttrice che lo faccia conspirare al ben pubblico ; e la seconda è più comune, e contagiosa, e sempre più si concentra in sè stessa. I vantaggi sono il prevenire delitti importanti, e che, essendone palesi gli effetti, ed occulti gli autori, intimoriscono il popolo ; di più, si contribuisce a mostrare che chi manca di fede alle leggi, cioè al pubblico, è probabile che manchi al privato. Sembrerebbemi che una legge generale, che promettesse l'impunità al complice palesatore di qualunque delitto fosse preferibile ad una speciale dichiarazione in un caso particolare, perchè così preverrebbe le unioni col reciproco timore. Una tal legge però dovrebbe accompagnare l'impunità col bando del delatore. Ma invano tormento me stesso che sento autorizzando le sacrosante leggi, la base della morale umana, al tradimento, ed alla dissimulazione. *Beccaria.* § *37.*

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(1) Attentati, complici. *Note of Jefferson.*

828. Falsa idea di utilità è quella, che sacrifica mille vantaggi reali, per un inconveniente o immaginario, o di poca conseguenza, che toglierebbe agli uomini il fuoco perchè incendia, e l'acqua perchè annega ; che non ripara ai mali, che col distruggere. Le leggi, che proibiscono di portar le armi, sono leggi di tal natura ; esse non disarmano che i non inclinati, nè determinati ai delitti, mentre coloro che hanno il coraggio di poter violare le leggi più sacre della umanità e le più importanti del codice, come rispetteranno le minori, e le puramente arbitrarie ? Queste peggiorano la condizione degli assaliti migliorando quella degli assalitori, non iscemano gli omicidi, ma gli accrescono, perchè è maggiore la confidenza nell'assalire i disarmati, che gli armati. Queste si chiaman leggi, non preventrici, ma paurose dei delitti, che nascono dalla tumultuosa impressione di alcuni fatti particolari, non dalla ragionata meditazione degl'inconvenienti, ed avvantaggi di un decreto universale. *ib.* § *40.*

829. (2) E meglio prevenire i delitti, che punirli. Questo è il fine principale d'ogni buona legislazione, che è l'arte di condurre gli uomini al massimo di felicità, o

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(1) False idee di utilità. *Note of Jefferson.*

(2) Prevenire i delitti. *Note of Jefferson.*

al minimo d'infelicità possibile. Il proibire una moltitudine di azioni indifferenti non è prevenire i delitti, che non possono nascere, ma egli è un crearne dei nuovi, egli è un definire a piacere la virtù ed il vizio, che ci vengono predicati eterni ed immutabili. A che saremmo ridotti, se ci dovesse essere vietato tutto ciò, che può indurci a delitto? Bisognerebbe privare l'uomo dell'uso di suoi sensi. Per un motivo, che spinge gli uomini a commettere un vero delitto, ve ne son mille che gli spingono a commetter quelle azioni indifferenti, che chiamansi delitti dalle male leggi ; e se la probabilità dei delitti è proporzionata al numero dei motivi, l'ampliare la sfera dei delitti è un crescere la probabilità di commettergli. Volete prevenire i delitti? Fate che le leggi sian chiare, semplici, e tutta la forza della nazione sia condensata a difenderle, e nessuna parte di essa sia impiegata a distruggerle. Fate, che gli uomini le temano, e temano esse sole. Il timor delle leggi è salutare, ma fatale e fecondo di delitti è quello di uomo a uomo.

§ *41*. Volete prevenire i delitti? fate che i lumi accompagnino la libertà. I mali che nascono dalla cognizione sono in ragione inversa della loro diffusione, e i beni lo sono nella diretta. Non v'è uomo illuminato, che non ami i pubblici, chiari, ed utili patti della comune sicurezza, paragonando il poco d'inutile libertà da lui sacrificata, alla somma di tutte le libertà sacrificate dagli altri uomini, che senza le leggi poteano divenire cospiranti contro di lui. Chiunque ha un'anima sensibile, gettando uno sguardo su di un codice di leggi ben fatte, e trovando di non aver perduto, che la funesta libertà di far male altrui, sarà costretto a benedire il trono, e chi lo occupa. § *42*. Un altro mezzo di prevenire i delitti è quello di ricompensare la virtù. § *45*.

830 (1). A misura che le pene divengono più dolci, la clemenza ed il perdono diventano meno necessari. La clemenza dunque dovrebb' essere esclusa in una perfetta legislazione dove le pene fossero dolci, ed il metodo di giudicare regolare es pedito. La clemenza è la virtù del legislatore (1), e non dell'esecutor delle leggi, che deve risplendere nel codice, non già nei giudizi particolari ; il far vedere agli uomini che si possono perdonare i delitti, e che la pena non ne è la necessaria conseguenza, è un fomentare la lusinga dell'impunità, è un far credere, che potendosi perdonare le condanne non perdonate siano piuttosto violenze della forza, che emanazioni della giustizia. Siano dunque inesorabili le leggi, inesorabili gli esecutori di esse nei casi particolari, ma sia dolce, indulgente, umano il legislatore. *Beccaria.* § *46.*

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(1) Delle Grazie. *Marginal note of Jefferson.*

831 (2). Perchè ogni pena non sia una violenza di uno, o di molti contro un privato cittadino, dev' essere essenzialmente pubblica, pronta, necessaria, la minima delle possibili nelle date circostanze, proporzionata ai delitti, dettata dalle leggi. § *47.*

832. Those who allege that the parliament of Great Britain have power to make laws binding the American colonies reason in the following manner; « that there is and must be in every state a supreme, irresistible, absolute, uncontrouled authority in which the *jura summi imperii*, or the rights of sovereignty reside. *Blackst. 48, 49.* That this supreme power, is, by the constitution of Great Britain vested in the King, lords and Commons *ib. 50, 51.* That therefore the acts of the king, lords, and commons, or in other words, acts of parliament, have by the British constitution a binding force on the American colonies, they composing a part of the British empire ». I admit that the principle, on which this argument is founded, is of great importance ; its importance however is derived from its tendency to promote the ultimate end of all government, but if the application of it would, in *any* instance, destroy, instead of promoting, that end it ought in *that* instance to be rejected : for to admit it

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(1) Puff. Off. hom. L. 2, C. 13 § 15. *Marginal of Jefferson.*

(2) Conclusione. *Marginal note of Jefferson.*

would be to sacrifice the end to the means, which are valuable only so far as they would advance it. — Will it then ensure and increase the happiness of the American colonies, that the parliament of Great Britain should possess a supreme irresistible, uncontrouled authority over them ? Wilson's *considerñs on the nature and extent of the legislative authority of the British parl. pa. 3* (1).

833. The values of land and labour do, as it were of themselves mutually settle or adjust one another. It may be reasonably allowed that a labouring man ought to earn at least twice as much as will maintain himself in ordinary food and cloathing ; that he may be enabled to breed up children, pay rent for a small dwelling, find himself in necessary utensils etc. So much at least the labourer must be allowed, that the community may be perpetuated. There is a difference in the proportion of the value of an acre of land to a given quantity of labour, all over the world, arising from the different ways of living of the peasants in different places ; for where labourers live poorly labour will be cheap and land also. So that the price of land is every where influenced by the price of labour, and consequently by the quality of food and raiment consumed by the labourers ; for of some sort they must have a sufficient quantity. *Harris's essay on money and coins. 8, 9, 10, 11* (2). It is the general opinion in England that a farmer makes three rents, viz. one for his landlord, one for the charge of his farm and labourer's wages, and a third for himself and family to subsist on and educate his children. The real cash or money necessary to carry on the circulation and barter of a state (1) is nearly one third part of all the annual rents of the proprietors of the said state, that is one ninth of the whole produce of the land. S^{r} William Petty supposes one-thenth part of the value of the whole produce sufficient. Postlethwayt. *Cash.*

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(1) Philadelphia, 1774. Published anonymously. The author, James Wilson was one of the signers of the Declaration of Independence and played an important part in the deliberations of the Congress in 1776. See Jefferson : *Autobiography. M. E. I, 19, 43, 51,* and Introduction p. 39.

(2) Joseph Harris, *Essay on money and Coins. London* 1756-58.

834. The first hostilities previous to the late war commenced in Asia, not in America. The battle of Arcott was fought by Lord Clive (then captain Clive) against the French ; that of Tritchinopoly by major Lawrence and a powerful fleet ordered to India, under the command of the Admirals Watson and Pocock, before the French were known to have committed any encroachments on the Ohio. Capt. Luttrell's speech. *Parliam. register. 1775, pa., 37.*

835. The bounds of Carolina are expressed in these words in the first Charter of Charles *2* to the E. of Clarendon, D. of Albemarle, L^{d} Craven, L^{d} Berkeley, L^{d} Ashley, S^{r} George Carteret, S^{r}. W^{m}Berkeley and S^{r}. John Colleton, dated $\frac{1662 . \text{Mar} . 24}{1663 . \text{Apr} . 4}$ « All that territory or tract of ground scituate, lying and being within our dominions in America, extending from the North and of the island called Lucke island, which lyeth in the Southern Virginia seas, and within six and thirty degrees of the northern latitude ; and to the West as far as the South seas, and so Southerly, as far as the river S^{t} Matthias which bordereth upon the coast of Florida, and within one and thirty degrees of the northern latitude, and so West in a direct line as far as the South seas aforesaid ; together with all etc. *4. Mémoires de l'Amérique. 556.* The second charter is to the same proprietors dated *1665.* June $\frac{13}{24}$ recites that at the request of the sd. grantees and as a further mark of the king's especial favor, and in favor to the pious purpose of the said grantees, the king is graciously pleased to enlarge the sd. grant to them according to the bounds therein after specified, to wit, « all that province, territory, or tract of ground, scituate, lying and being within our dominions of America aforesaid, extending North and Eastward, as far as the North end of Carahtuke river, or Gulet, upon a streight Westerly line, to Wyonoake creek, which lyes within, or about the degrees of thirty six, and thirty minutes northern latitude, and so West, in a direct line as far as the South seas ; and South and Westward, as far as the degrees of twenty nine inclusive northern latitude, and so West in a direct line, as far as the South seas ; together with » etc. *4. Mém. de l'Amér. 587.*

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(1) This last part of the article has been quoted in full by Jefferson in a letter addressed to John W. Eppes, November 6, 1813, and in which he attempted to refute the theories of Adam Smith. *M. E, XIII, 414.*

(2) Jefferson referred to the « 4th *Mémoires de l'Amérique* » in his *Report relative to negotiations with Spain to secure the free navigation of the Mississippi, and a port on the same, March 18, 1792, M. E., III, 164.* In a foot-note to the part concerning the limits of Georgia he said : « Mr. Short is desired to purchase this book at Amsterdam or Paris, as he may not find it at Madrid, and when it shall have answered the purposes of his mission, let it be sen there for the use of the Secretary of State's Office. *M. E., III, 170.*

The charter of Georgia dated 1737, June $\frac{9}{20}$ granted by George 2d recites that many of his subjects were poor through want of employ, and would be glad to settle in America, that South Carolina had been ravaged by the Indians in the late war, and in case of a new war would be exposed to the like calamities, as their whole Southern frontier was unsettled, which might be prevented if a regular colony was settled in the Southern territories of Carolina ; it then proceeds to erect certain trustees for 21 years into a corporation to receive charitable contributions for the support of the said colony and in general to conduct and manage the settlement and government, and proceeds to «grant to the sd Corporation and their successors, the reservation limitation and declaration hereafter expressed, seven individual parts, (the whole in eight equal parts to be divided) of all those lands, countries, and territories, situate, lying and being, in that part of a stream or river there, commonly called the Savannah, all along the sea-coast to the Southward, unto the most Southern stream of a certain other great water or river, called the Alabamaha, and westerly from the heads of the said rivers respectively in direct lines to the South seas; and all that share, circuit and precinct of land, within the sd. boundaries, with the islands on the sea lying opposite the eastern coast of the island, within 20 leagues of the same, which are not inhabited already, or settled by any authority derived from the crown of Great Britain, together with all » etc. *4., Mém. de l'Amérique. 634.*

836. The charter for Maryland is « to Cecilius Calvert Baron of Baltemore (sic) *in Ireland* » *dated* 8 *Car.* 1. *June* 20, and describes the boundaries in the following words : « all that part of a peninsula laying in the parts of America between the Ocean on the East and the bay of Chesapeak on the West and divided from the other part thereof by a right line drawn from the promontory or cape of land called Watkins point (situate in the aforesaid bay near the river Wighes) on the West, unto the main ocean on the East, & between that bound on the South unto the part of Delaware bay on the North which lieth under the fortieth degree of the Northern Northernly latitude from the Equinoctial where New England ends : and all the tracts of land between the bounds aforesaid, that is to say, passing from the aforesaid bay called Delaware bay in a right line by the degree aforesaid unto the true meridian of the first fountain of the River Puttowmack, and from thence tending toward the South unto the further bank of the aforesaid river and following the West and South side thereof unto a certain place called Cinquack, situate near the mouth of the said river where it falls into the bay of Cheseapeack and from there by a streight line unto the aforesaid promontory and place called Watkin's point (so that all that tract of land divided by the line aforesaid drawn between the main ocean and Watkin's point unto the promontory called cape Charles, and all it's appurtenances do remain entirely excepted to us our heirs and successors for ever) » see act ass. 1663 *c. 2.* Penris *119.* Watkin's point decided as follows: « and whereas it hath been controverted by some ignorant ill-disposed persons, where Watkin's point the Lord Baltemore's Southermost bounds on the Eastern shore is scituate : this grand assembly by the care and special enquiry of five able selected surveyors and two burgesses, and on the due examination thereof, conclude the same place of Watkin's point to be the north side of Wiccacommico river on the Eastern shore, and near unto and on the South side of the streight Lymbo, opposite to Potuxent river ; which place according to capt. John Smith and discoverers with him, in the year 1608 was so named being the Lord Baltemore's bounds on the Eastern shore. » For Wighcocomoco, Cinquack, Wighes and Watkin's point, see capt. Smith's map of Virginia.

837. There is a difference between a Fine and an Amercement : for a fine is always imposed and assessed by the court, but an amercement, which is called in Latin « *misericordia* » is assessed by the country. 2. *Inst. 27. 8. Co. 39. 40*, Griesley's ca. & the authorities there cited.

838 (1). The *8 El. c. 4.* makes it death to pick a pocket of 12^d value, but an open larceny (not a robbery) to any amount, and a larceny from a dwelling house under the value of *40 l*, is clergiable. By *7. Geo. 2. c. 21*, it is only a transportable offence to assault one with intent to rob ; but by *9. Geo. 1. c. 32*, it is death without clergy to write an anonymous letter signed with a fictitious name demanding money, venison, or other valuable thing. Punishments should be proportioned to the flagitiousness of the crime, not to the opportunities or temptations to commit it. By *22 Car. 2. c. 25.* § . *3, 4. G. 2. c. 16. 18, G. 2. c. 19*, it is death without benefit of clergy to steal cloth from the tenters, fustian from the bleaching ground, or a lamb from their landlord's pasture. Penal laws should not wage war with the natural sentiments of the heart. We must censure then the stat. *21. Iac. 1. c. 27*, which makes concealment of the death of a bastard child by the mother, i. e. a concealment of her infamy, evidence that she murdered it; and consequently compels her to be the first to publish her own shame: so also the construction of laws which subjects a son, husband or father to the pains of treason for concealing or protecting a wife, parent or child guilty of treason. To oblige a person to accuse himself, as by the Inquisition, is a violation of the first principle of nature, self-preservation. It is difficult to account for the diversifying the punishm̃t of certain crimes similar in their nature. To counterfeit foreign coin legitimated by proclamation works corruption of blood, Foster *226*, which is expressly saved in counterfeiting the current coin. 5. El. c. *11. and 8. 9.* W. *3. c. 29.* It is clergyable to destroy or damage the bridges of Brentford or Blackfriars; but not so for the bridges of London, Westminster, or Patney. There is a similar distinction between prison breakers convicted of perjury, or committed for entering black lead mines with intent to steal; and such as are convicted of or committed for, any other offence within clergy (*1*). It is still a felony to steal a hawk, and death to associate one month with Egyptians, or to wander being a soldier or mariner, without a testimonial under the hand of a justice, *5. El. c. 20. p. 23. 39. El. c. 17.* Obsolete or useless statutes should be repealed. They weaken the useful ones. Jailers forcing prisoners to become approvers, masons confederating to prevent the statutes of la-

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(1) Abstract from William Eden : *Principles of Penal Law, London* 1772.

(1) Laws made on the spur of the occasion should have a short and limited duration. *Note of Jefferson.*

bourers, purveyors in certain cases, (tho' purveiance is abolished) are capital offenders. *43. El. c. 23. 14*, *E. 3. c. 10*, *3. H. 6. c. l. 28*, *E. 1. stat. 3. c. 1.* and it is a forfeiture of life and goods to bring pollardz or crochardz (which are foreign coins of base metal) into the realm. 27. E. 1, Eden *on penal law*. c. 2.

839. The infliction of death is not to be considered as a mode of punishment, but merely as the last melancholy resource to exterminate from society those whose continuance among us is inconsistent with the public safety. It is unjustifiable then to aggravate capital executions by any circunstances of terror or pain. *id. c. 3* (1).

840. The privileges of sanctuaries being taken away by the act of Jac. I, abjuration as founded thereon is virtually abolished. *id. c. 3.*

841. Corporal punishment should be infamous in the estimation of the people : so should degradation from titles of honor, civil incapacities, bendings, and public exhibitions of the offender : all of which should be applied with great caution, and only to offences infamous in their nature. In any case, to fix a lasting visible stigma upon the offender is contrary to humanity and sound policy. The wretch finding himself subjected to continual insult, becomes habituated to his disgrace, and loses all sense of shame, yet branding has prevailed in most systems of law. The *2* and *3. E. 6* inflicts perpetual infamy on an offence of civil institution *5. and 6*, *E. 6. c. 4*, punishes a blow given in the churchyard with loss of an ear. *8. El. c. 3*, punishes with imprisomñt and the loss of the left hand, the sending of live sheep out of the kingdom, or embarking them on board a ship, *id. c. 7*.

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(1) And whereas, the reformation of offenders, though an object worthy of the attention of the laws, is not effected at all by capital punishments, which exterminate instead of reforming, and should be the last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizens. *Bill for proprotioning Crimes and Punishments*, M. E. *I*, *219*.

842. Pecuniary punishments are wise and merciful. They convert the little attachments of selfishness into the strong holds of society, but these must not be fixed ; because the value of money fluctuates, and the circumstances of offences are infinitely various, Eden *on penal law. c. 8.*

843. May it not be doubted whether the leaving bodies to rot, like scare-crows, on gibbets, does not tend to familiarize such objects, blunt the sentiments and destroy the benevolent prejudices of the people ? It is impossible to offer any solid objection to the dissection of criminals. Modern ages will confine it to the dead. Celsus lamented the œra, of his own existence « *ubi præ iniquitate temporum vivos homines dissecare non licet* ». There is a seeming liberality of sentiment in the proposal to subject certain classes of criminals to medical experiments for the benefit of mankind, but if the experiments be without hazard, they are unnecessary ; if of a nature to maim or disable, they are cruel and impolitic ; if dangerous the uncertainty of the event destroys the solemnity in the eyes of the people, and the criminal expects the decision with the heated anxiety of a gambling adventurer. The modern advancement of medical knolege makes such aids useless and ineligible, *ib. c. 9.*

844. Lawgivers should be extremely cautious not to confound atrocious breaches of the civil contract, with the simple violations of the police. The mere knowlege and concealment of treason, without any degree of assent thereto, is called in our law misprision of treason ; and is punished with the loss of the profits of land during life, forfeiture of goods, and imprisonment, during life. By *14. El. c. 3*, it is misprision of treason to forge any foreign coin, though not made current by proclamation, by *9. E. 3. st. 2*, no sterling money shall be melted down on pain of forfeiture thereof this law is in a spirit very different from that of *9. W. 3. c. 26*, which makes it felony to receive or pay any counterfeit or diminished money of the kingdom at a less rate than it shall import to be of. By *9 G. 2. c. 30. and 29, and O. r. c. 17*, it is felony without clergy for any subject of Gr. Britain to enlist into foreign service, or for any person to procure such enlistment, without license under the king's sign manual. Desertion from the king's armies in time of war is felony by *3. E. 6. st. 2*, and triable by the justices of every shire. Prison breaking by an offender lawfully commited, was felony at the common law in every case, but by l: E. z, not punishable in life or member but where the offence for which he was emprisoned would have been so. This bears hard on the natural principle of self preservation. The rescue of one from arrest, or emprisonment, is in many cases felony not clergiable. *id. c. 17*.

845. Involuntary manslaughter happeneth in the case of death accidental, ensuing upon an act unlawful as malum in se, but in the nature only of a trespass, but if the homicide be in consequence of an act felonious in itself, or in prosecution of a felonious intent, it will be murder. A man shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbor. The guilt of this man in the eye of the English law, and consequently the proportion of his punishment will depend partly on the nature, shape and size of the bird; and partly on the intention of the man with respect to the bird, but will have no connection with the act of homicide. If the bird was a wild pigeon,

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(1) A very similar discussion is found in the *Bill proportioning Crimes and Punishments*, although the authorities quoted by Jefferson are different there « : The shooting at a wild fowl, and killing a man, is homicide by misadventure. Shooting at a pullet, without any design to take it away, is manslaughter; and with a design to take away, is murder. O Stat. tr. 222. To shoot at the poultry of another, and thereby set fire to his house, is arson in the opinion of some. Dalt. c. 116. I. Hale's P. C. 569. c. contra. *M. E., I. 224.*

feræ naturæ et nullius in bonis, it will be excusable homicide. If a tame fowl, and shot at for the amusement or improvement of the marksman, it will be felonious, and manslaughter, because an unlawful trespass on the property of another : if the bird were private property and intented to be stolen, it will be murder, by reason of that felonious intent. So a man endeavouring to kill another, misses his blow and kills himself, it is wilful self murder. That external unconnected circumstances should regulate the nature and enormity of crimes, that the intention should be transferred to the accident which results from it, is preposterous and unnatural. Every member of society hath a right to do any act without the apprehension of the inconveniencies, than those which are the proper consequences of the act itself. — Taking away the life of another by false testimony, deliberately given, was capital in Rome : « *qui falsum testimonium dolo dixerint, quo quis publico judicio rei capitalis damnaretur.* » *Dig. l. 48. l. 8. § 1.* So of magistrates putting an innocent man to death for a bribe, *Dig. 48, 11. 7. 3.* In England false testimony is not so severely punished ; partly from an apprehension that witnesses might stifle testimony if given at the peril of their lives, partly because in their trials the accused may produce contrary testimony and have the fact discussed by every possible means. Drunkedness is no excuse for murder in England. They hold that one crime ought not to be privileged by another. The Roman law was more indulgent « *per vinum delapsis capitalis poena remittitur.* » *ff. 49. 16. 6.* Petty treason is where a wife kills her husband, or a servant his master. Strange that parricide should not be so considered also. There must be two witnesses in petty treason. If there be but one, qu. if punishable as simple murder. Foster *328.* contra *2. Hawk. 258. § 144*, *Eden*, *c. 18.*

846. « When the Dutch and Swedes were expelled from New York by the English admiral Pen, who in conjunction with Venables, had conquered the island of

Jamaica, being well with Charles II, obtained a promise of a grant of this country from that monarch. Upon the admiral's death, his son, the celebrated quaker, availed himself of this promise and after much sollicitation obtained the perfomance of it (1). Guthrie's *Geogr. gram. lil. Pennsylvã.* See I. Bum. *own li. 219* ann. *1665*, that admiral Pen obtained the favor and interest of the D. of York (aftwds Jac. *2.*) by keeping secret an order he had received from the D. of York to slacken sail so as to avoid engaging the Dutch fleet. The Duke was then on board the fleet and was suspected of being panic struck. Pen obeyed the order and an opportunity of improving an advantage over the Dutch fleet was thereby lost.

847. Ubi regimen civitatis collatum est in Concilium, ex pluribus hominibus constans, quorum quisque suam retinet voluntatem naturalem ; regulariter illud habetur pro voluntate civitatis, in quod consenserit *major pars* hominun, ex quibus consilium componitur, nisi expresse statutum sit, quota pars concilii consentiens requiratur ad repraesentandam voluntatem universitatis. Puffend. *De offic. hom. el civ. L. 2. c. 6. § 12.* The law *majoris partis* recognised, Bro *abr. Corporalions, 31. 34.* Hakewell *93.*

848. The division of lands amongst the male offspring the antient Irish called GABHALAS-CINNE or CAVAIL-KINNE, from which Irish word, literally signifying a

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(1) William Guthrie, *Geographical, Historical and Commercial Grammar*, 1770.

(2) « The law of the *majority* is the natural law of every society of men. *Official opinions.* 1790, *Ford ed. V.* 206. « Absolute acquiescence in the decisions of majority, the vital principles of republics, from which there is no appeal but force. *Inaugural address*, March 4, 1801, *M. E., III, 321*, etc. In the *Notes on Virginia* is found a sentence which seems to be nearer to the text of Puffendorf and particularly to the « *nisi expresse statutum sit* » : « The *lex majoris partis* is the natural law of every assembly of men, whose numbers are not fixed by any other law. » *Notes on Virginia, Query, XIII, M. E., II, 172.*

family settlement, the English formed the term GAVELKIND. the word GAVAIL or GAVALTAS in the old Irish language signified any landed settlement, whether by inheritance or conquest. — Taylor is certainly right in deriving the word GAVELKIND (Clarke's *pref. to Hywel Dha's laws*) from GAFAEL i. e, *tenura* and CENEDL, i. e. *generatio*, i. e. *fundus gentilis*, *sive hereditarius*, and this agrees perfectly with the Irish GAVAIL-CINNE. Valancey's *collectanea de rebus Hibernicis. pref. to. N° 3.* (1).

849. Qu'est-ce que l'âme ? (2) Les seuls qui sur ce sujet s'exprimoient avec sublimité, étoient les Parsis. Prononçoient-ils une oraison funèbre sur la tombe de quelque grand homme ! ils s'écrioient : « ô terre ! ô mère commune des humains ! reprends du corps de ce héros ce qui t'appartient : Que les parties aqueuses renfermées dans ses veines s'exalent dans les airs, qu'elles retombent en pluie sur les montagnes, enflent les ruisseaux, fertilisent les plaines, et se roulent à l'abyme des mers d'où elles sont sorties ! Que le feu concentré dans ce corps se rejoigne à l'astre, source de la lumière et du feu ! Que l'air comprimé dans ces membres rompe sa prison ! Que les vents les dispersent dans l'espace ! Et toi enfin, souffle de vie, si par impossible, tu es un être particulier, réunis-toi à la substance inconnue qui t'a produit ! Ou si tu n'es qu'un mélange des élémens visibles, après t'être dispersé dans l'univers, rassemble de nouveau tes parties éparses, pour former encore un citoyen aussi vertueux ! » — *L'esprit* de l'homme se compose de l'assemblage de ses idées, il n'est point d'esprits sans idées. En est-il ainsi de l'*âme* ? non : ni la pensée, ni l'esprit ne sont nécessaires à son existence tant que l'homme est sensible, il a une âme. C'est donc la faculté de *sentir* qui en forme l'essence. Qu'on dépouille l'âme de ce qui n'est pas proprement elle, c'est-à-dire, de l'organe physique du souvenir, quelle faculté lui reste-il ? Celle de sentir. — L'on perd la mémoire par un coup, une chute, une maladie. L'âme est-elle privée de cet organe ? elle doit se trouver alors dans le même état d'imbécilité où elle étoit dans le germe de l'homme. La pensée n'est donc pas absolument nécessaire à l'existence de l'âme. L'âme n'est donc en nous que la *faculté de sentir*. — Mais qu'est-ce en nous que la faculté de sentir ? Est-elle immortelle et immatérielle ? — Voici ce qu'à l'occasion de l'âme des animaux pense un fameux chymiste (*1*) anglois. On reconnoit dit-il, dans les corps, deux sortes de propriétés, les unes dont l'existence est permanente et inaltérable ; telles sont l'impénétrabilité, la pesanteur, la mobilité etc. ces qualités appartiennent à la physique générale. Il est dans ces mêmes corps d'autres propriétés dont l'existence fugitive et passagère est tour-à-tour produite et détruite par certaines combinaisons, analyses ou mouvements dans les parties internes. Ces sortes de propriétés forment les différentes branches de l'histoire naturelle, de la Chymie, etc. elles appartiennent à la physique particulière. Le fer, par exemple, est composé de phogistique, et d'une terre particulière. Dans cet état de composition, il est soumis au pouvoir attractif de l'aimant. Décompose-t-on le fer ? Cette propriété est anéantie. L'aimant n'a nulle action sur cette terre ferrugineuse dépouillée de son phlogistique. Lorsqu'on combine ce métal avec une autre substance telle que l'acide vitriolique, cette union détruit pareillement dans le fer la propriété d'être attiré par l'aimant. L'alkali fixe et l'acide nitreux ont chacun en particulier une infinité de qualités diverses ; mais il ne reste aucun vestige de ces qualités, lorsqu'unis ensemble, l'un et l'autre forment le salpêtre. Dans la

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(1) *Collectanea de Rebus Hibernicis*, published by Major Charles Vallancey, Dublin, 1774-1783. N° III, *A Critico- Historical Dissertation Concerning the antient Irish Laws, or National Customs, called Gavel-Kind, and Thanistry, or Senior Government.* Dated : Dublin, July 1774.

(2) Helvétius, *De l'homme*, 1772.

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(1) Dr. Gem. *Note of Jefferson.* See also the end of this article.

chaleur ordinaire de l'atmosphère, l'acide nitreux se dégage de tout autre corps pour se combiner avec l'alkali fixe. Que l'on expose cette combinaison au degré de chaleur propre à faire entrer le nitre en une fusion rouge, et qu'on y ajoute une matière inflammable quelconque, l'acide nitreux abandonne l'alkali fixe pour s'unir au principe inflammable, et dans l'acte de cette union, naît cette force élastique dont les effets sont si surprenans dans la poudre à canon. On détruit toutes les propriétés de l'alkali fixe, lorsqu'on le combine avec du sable, et que l'on en forme du verre, dont la transparence et l'indissolubilité, la puissance électrique, etc. sont, si j'ose le dire autant de nouvelles créations qui produites par ce mélange, sont détruites par la décomposition du verre. Or dans le règne animal pourquoi l'organisation ne produiroit-elle pas pareillement cette singulière qualité qu'on appelle faculté de sentir (1). Tous les phénomènes de médecine et d'histoire naturelle prouvent évidemment que ce pouvoir n'est dans les animaux que le résultat de la structure de leur corps, que ce pouvoir commence avec la formation de leurs organes, se conserve tant qu'ils subsistent, et se perd enfin par la dissolution de ces mêmes organes. Si les Métaphysiciens me demandent ce qu'alors devient dans l'animal la *faculté de sentir*, ce que devient, leur répondrai-je, dans le fer décomposé la qualité d'être attiré par l'aimant. Voyez *Treatise on the principles of Chimistry*. HELVETIUS *de l'homme. Sect. 2, c. 2. 3.* (1).

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(1) The same theory is developped in a letter of Jefferson to John Adams, (*March* 14, 1820), but is there attributed to Destutt de Tracy and Cabanis, both disciples and continuators of Helvétius : « They ask why may not the mode of action called thought, have been given to a material organ of peculiar structure, as that of magnetism is to the needle, or elasticity to the spring by a particular manipulation of the steel. They observe that on ignition of the needle, or spring, their magnetism and elasticity cease. So on dissolution of the material organ by death, its action or thought may cease also, and that nobody supposes that the magnetism of elasticity retire to hold a substantive and distinct existence. These were qualities only of a particular conformation of matter ; change the conformation and its qualities change also » . *Memorial edition, XV, 239.* See also my book on *Jefferson et les Idéologues*, p. 275.

850. (2) Quelques-uns doutent que la science de *dieu*, ou la *Théologie* soit une science, toute science, disent-ils, suppose une suite d'observations. Or quels observations faire sur un être invisible et incompréhensible ? La Théologie n'est donc point une science. En effet que désigne le mot *Dieu* ? la cause encore inconnue de l'ordre et du mouvement. Or que dire d'une cause inconnue ? Attache-t-on d'autre idées à ce mot Dieu ? On tombe, comme le prouve M. Robinet, dans mille contradictions. *id. Sect. 2. c. 2. note.* « Nul doute, disent les lettrés Chinois, qu'il n'y ait dans la nature, un principe puissant et ignoré de ce qui est : mais lorsqu'on divinise ce principe inconnu, la création d'un dieu n'est plus alors que la déification de l'ignorance humaine. » — Je ne suis pas de l'avis des lettrés Chinois, quoique forcé de convenir avec eux, que la théologie, c'est-à-dire, la science de dieu ou de l'incompréhensible n'est point une science particulière. Qu'est-ce donc que la théologie ? je l'ignore. *id. ib.* — C'est à des disputes de mots qu'il faut rapporter presque toutes les accusations d'athéisme. Il n'est donc point d'Athée. Celui-là n'est point Athée qui dit, le mouvement est Dieu ; parce qu'en effet le mouvement est incompréhensible , parce qu'on n'en a pas d'idées nettes, parce qu'il ne se manifeste que par ses effets, et qu'enfin c'est par lui que tout s'opère dans l'univers. Celui-là n'est pas Athée, qui dit au contraire le mouvement n'est pas Dieu, parce que le mouvement n'est pas un être, mais une manière d'être. Ceux-là ne sont pas Athées qui soutiennent le mouvement essentiel à la matière, qui le regardent comme la force invisible et motrice qui se répand dans toutes ses parties. Voit-on les astres changer continuellement de lieu, se rouler perpétuellement sur leur centre ; voit-on enfin la nature dans une fermentation et une dissolution éternelle ? Qui peut nier que le mouvement ne soit comme l'étendue, inhérent aux corps, et que le mouvement ne soit cause de ce qui est. En effet diroit Mr. Hume, si l'on donne toujours le nom de cause et d'effet à la concomitance de deux faits, et que partout où il y a des corps, il y ait du mouvement, on doit donc regarder le mouvement comme l'âme universelle de la matière et de la divinité qui seule en pénètre la substance. Mais les philosophes qui sont de cette dernière opinion sont-ils des Athées ? non : ils reconnoissent également une force inconnue dans l'univers. Ceux mêmes qui n'ont point d'idées de Dieu, sont-ils des Athées ? non : parce que tous les hommes le seroient ; parce qu'aucun n'a d'idées nettes de la divinité ; parce qu'en ce genre toute idée obscure est égale à zéro, et qu'enfin avouer l'incompréhensibilité de Dieu, c'est comme le prouve M. Robinet, dire sous un tour de phrase différent, qu'on n'en a point d'idée. *id. note 28.* — Peu de philosophes ont nié l'existence d'un Dieu physique : « il est une cause de ce qui est, et cette cause est inconnue ». Or qu'on lui donne le nom de Dieu ou tout autre : qu'importe ? Les disputes à ce sujet ne sont que des disputes de mots. *id. sect. 9. note 15.* Peu de nations, disent les voyageurs, honorent le diable sous son vrai nom : mais beaucoup l'honorent sous celui de Dieu. Un peuple adore-t-il un être dont les lois sont incompréhensibles ? cet être exige-t-il la croyance de l'incroyable ? commande-t-il l'impraticable, punit-il une foiblesse par des tourmens éternels ? damneroit-il enfin l'homme vertueux pour n'avoir pas fait l'impossible ? Il est évident que sous le nom de Dieu, c'est le diable qu'un tel peuple adore (1). Voyez le livre *on false religion* d'où j'ai tiré ce passage, *id. c. 3.*

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(1) « Dr. Gem told me at Paris, that having expressed these ideas one day in conversation with Helvetius, he desired Dr. Gem to put them in writing, which he did in English. Helvetius translated them and inserted them by way of note in his book, and cited merely as a blind, a pretended *Treatise on chemistry.* » Note of Jefferson which both from the color of the ink and from the handwriting seems to have been added at a later date.

(2) The dislike of Jefferson for theology is too well known to require any confirmation here. In a letter to John Adams dated *April 11, 1823* he expressed views very similar to those of Helvétius, *M.E., XV, 425.* See also his letters to Thomas Cooper, *October 7, 1814, M.E., XIV, 200* and to P. H. Wendover, *March 13, 1815, M.E., XIV, 279* in which he opposed strongly the immixion of theology into medicine, law and politics.

851. On peut se demander si par une ligue féderative plus parfaite que celle des Grecs, un certain nombre de petites républiques ne se mettroient pas à l'abri et de l'invasion de l'ennemi, et de la tyrannie d'un citoyen ambitieux. Si dans la supposition où l'on partageât en trente provinces ou républiques, un pays grand comme la France ; où l'on assignât à chacun de ces états un territoire à peu près égal ; où ce territoire fût circonscrit et fixé par des bornes immuables, où sa possession enfin fût garantie par les vingt-neuf autres républiques (2), il est à présumer qu'une de ces républiques pût asservir les autres, c'est-à-dire, qu'un seul homme se battît avec avantage contre vingt-neuf ; si dans la supposition où toutes ces républiques seroient gouvernées par les mêmes lois ; où chacun de ces petits états chargé de sa police intérieure et de l'élection de ses magistrats, répondoit à un conseil supérieur composé de quatre députés de chaque république, et principalement occupé des affaires de la guerre et de la politique, seroit cependant chargé de veiller à ce que chacune de ces républiques ne reformât ou ne changeât sa législation que du consentement de toutes ; ou d'ailleurs l'objet des lois seroit d'élever les âmes, d'exalter le courage et d'entretenir une discipline exacte dans les armées : si dans une telle supposition le corps entier de ces républiques ne seroit pas toujours assez puissant pour s'opposer efficacement aux projets ambitieux de leurs voisins et de leurs concitoyens. HELVETIUS *de l'homme*, *sect. 9. c. 2.* Le Paraguai est un pays immense. Du temps des Jésuites, ce pays, si l'on en croit certaines relations, partagé en *30* cantons, étoit gouverné par les mêmes lois et les mêmes magistrats ; c'est-à-dire, par les mêmes religieux. Or si ces *30* cantons ne formoient cependant qu'un même empire dont les forces pouvoient à l'ordre des Jésuites se réunir contre l'ennemi commun, et si l'existence d'un fait en démontre la possibilité, la supposition d'un pareil empire n'est donc pas absurde. *id. ib. c. 4.*

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(1) I can never join Calvin in addressing *his God.* He was indeed an atheist, which I can never be ; or rather his religion was dœmonism. If ever man worshipped a false God, he did. The Being described in his five points, is not the God whom you and I acknowledge and adore, the Creator and benevolent Governor of the world ; but a dœmon of malignant spirit. *To John Adams, april 11, 1823, M.E., XV, 425.*

(2) To draw around the whole nation the strength of the General Government, as a barrier against foreign foes, to watch the border of every State, that no external hand may intrude, or disturb the exercise of self-government... these shall be faithfully pursued according to the plain and candid import of the expressions in which they were announced. *Reply to Vermont Address, November 20, 1801, M.E., X, 293.* See also Jefferson's letter to Destutt de Tracy, *January 26, 1811, M.E., XIII, 13* and my book on *Jefferson et les Idéologues*, p. *74 and ff.*, where the resemblance to Helvetius is still more striking.

852. Whilst Omar, the second of the successors of Mahomed was extending his conquests over Syria, Phœnicia, Palestine etc., his lieutenants s'avançaient en Perse. Le dernier des rois Persans, Hormisdas IV livre bataille aux Arabes à quelques lieux de Madain. Il perd la bataille et la vie. Les Perses passent sous la domination d'Omar plus facilement qu'ils n'avaient subi le joug d'Alexandre. Alors tomba cette ancienne religion des mages, que le vainqueur de Darius avait respectée ; car il ne toucha jamais au culte des peuples vaincus. Les Mages — regardaient leur religion comme la plus ancienne et la plus pure. La connoissance qu'ils avaient des mathématiques, de l'astronomie et de l'histoire augmentait leur mépris pour leurs vainqueurs alors si ignorans. Ils ne purent abandonner une religion consacrée par tant de siècles. — La plupart se retirèrent aux extrémités de la Perse, et de l'Inde. C'est là qu'ils vivent aujourd'hui sous le nom de Gaures ou de Guebres, de Parsis, d'Ignicoles, ne se mariant qu'entre eux, entretenant le feu sacré, fidèles à ce qu'ils connoissent de leur ancien culte ; mais ignorans, méprisés, et, à leur pauvreté près, semblables aux Juifs si longtems dispersés sans s'allier aux autres nations, et plus encore aux Banians, qui ne sont établis et dispersés que dans l'Inde, et en Perse, *14* VOLTAIRE *374. Essai sur les mœurs. c. 6.*

853. Dans le chaos des superstitions populaires, il y eut une institution salutaire qui empêcha une partie du genre humain de tomber dans un entier abrutissement ; ce fut celui des mystères. — L'unité de Dieu était le grand dogme de tous les mystères. — Je ne doute pas que dans tous ces mystères, dont le fonds était si sage et si utile, il n'entrât beaucoup de superstitions condamnables. Les superstitions conduisirent à la débauche, qui amena le mépris. Il ne resta enfin de tous ces anciens mystères que des troupes de gueux que nous avons vu sous le nom d'Egyptiens et de Bohémiens courir l'Europe avec des castagnettes, danser la danse des prêtres d'Isis, vendre du baume, guérir la galle, et en être couverts, dire la bonne avanture, et voler des poules. Telle a été la fin de ce qu'on a eu de plus sacré dans la moitié de la terre connue. *14.* VOLT. *136-141. Philos de l'histoire des mystères de Cérès Eleusine.*

854. Tandis qu'un lieutenant d'Omar subjugue la Perse, un autre enlève l'Egypte entière aux Romains, et une grande partie de la Lybie. C'est dans cette conquête qu'est brûlée la fameuse bibliothèque d'Alexandrie, monument des connoissances et des erreurs des hommes, commencée par Ptolémée Philadelphe et augmentée par tant de rois. Alors les Sarrazins ne vouloient de science que l'Alcoran ; mais ils faisaient déjà voir que leur génie pouvait s'étendre à tout. L'entreprise de renouveler en Egypte l'ancien canal creusé par les rois, et rétabli ensuite par Trajan, et de rejoindre ainsi le Nil à la mer Rouge, est digne des siècles les plus éclairés. Un gouverneur d'Egypte entreprend ce grand travail sous le califat d'Omar, et en vient à bout. Quelle différence entre le génie des Arabes, et celui des Turcs ! Ceux-ci ont laissé périr un ouvrage dont la conservation valait mieux que la conquête d'une grande province. *14* Volt. *275. Essai sur les mœurs. c. 6.* (1).

855. Les auteurs de l'Encyclopédie furent traités comme l'avaient été à Paris les inventeurs de l'art admirable de l'imprimerie, lorsqu'ils vinrent y débiter quelques-uns de leurs essais : on les prit pour des sorciers, on saisit juridiquement leurs livres ; on commença contre eux un procès criminel. L'Encyclopédie fut supprimée : mais enfin la raison l'emporta. Le destin de cet ouvrage a été celui de toutes les enterprises (*sic*) utiles, de presque tous les bons livres, comme celui de la Sagesse de Charon, de la savante histoire composée, par le sage de Thou, de presque toutes les vérités neuves, des expériences contre l'horreur du vide, de la rotation de la terre, de l'usage de l'émétique, de la gravitation, de l'inoculation. [*He might have added the use of the potato*] Tout cela fut condamné d'abord, et reçu ensuite avec la reconnoissance tardive du public. *25* Volt. *5. Introduction aux Questions sur l'Encyclop.*

856. L'église de Rome resta longtems tranquille et sage au milieu d'un sénat et d'un peuple qui la méprisait. Il y avait dans cette capitale du monde connu *700* temples grands et petits dédiés aux dieux *majorum et minorum gentium.* Ils subsistèrent jusqu'à Théodose ; et les peuples de la campagne persistèrent longtems après lui dans leur ancien culte. C'est ce qui fit donner aux sectateurs de l'ancienne religion les noms de Payens, Pagani, du nom des bourgades appellées *pagi*, dans lesquelles on laissa subsister l'idolatrie, jusqu'au huitième siècle ; de sorte que le nom de payens ne signifie que paysans, villageois. *14.* Volt. *Ess. sur les mœurs. c. 10.*

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(1) On the discovery by the Portuguese of the passage to the E. Indies by the Cape of G. hope the Venetians proposed to the Sultan of Egypt to cut the isthmus of Suez at their own expence and to open a canal from the Nile to the Red sea. The difficulties which arose rendered this project abortive, *6. Volt. 232, Marginal note of Jefferson.*

857. La *Peste* proprement dite, est une maladie particulière aux peuples de l'Afrique, comme la *Petite Vérole.* C'est de ces pays qu'elle vient toujours par des vaisseaux marchands. *14* Volt. *422. Ess. sur les mœurs. c. 29.* La *Peste* est une maladie attachée au climat du milieu de l'Afrique, comme la Petite Vérole à l'Arabie, et comme le venin qui empoisonne la source de la vie est originaire chez les Caraïbes, *ib. c. 75. pa. 264. tome 15* (1).

857. Il n'y a pas dans toute la terre habitable et connue 400 espèces d'animaux quadrupèdes, en y comprenant même les singes pour quarante. *18.* Buffon. *171. édit. Paris 1764. 32 tomes 12 mo.*

858. Chivalry was a warlike establishment among the Seigneurs, of their own accord, as was that of the devout fraternities among the citizens. The anarchy and licence which desolated Europe in the decline of the house of Charlemagne gave rise to this institution. Dukes, counts, vicounts, chatelains and vidames being become sovereigns of their lands, made war on one another: and instead of those great armies of Charles Martel, Pepin and Charlemagne all Europe was divided into little hoops of seven or eight hundred men. Every castle was become a den of robbers and ravishers. Many seigneurs associated themselves by degrees for the public safety, and to protect the ladies. They made a vow of it. Ceremonies of installation, religious and profane were established. This was followed by great feasts and sometimes tournaments, for which however the people payed. A tax was imposed on them by the landlord for the day on which he was to

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(1) Il est certain que le venin qui empoisonne les sources de la vie était propre de l'Amérique et surtout de l'isle Hispaniola, comme la peste et la petite vérole sont des maladies originaires de la Numidie méridionale *16.* *Volt. The small pox is not mentioned in history earlier than the beginning of the Saracene conquest.* Douglas, *America, v. 2, p. 393, Marginal note of Jefferson.*

arm his son a knight. This was generally at 21 years of age. Till that time they were *batchelors*, that is *bas-chevaliers*, varlets or squires. The times of the crusades were those in which chivalry was most in vogue. The Seigneurs of fiefs who armed their vassals under their banners, were called *knights-bannerets*. They were in virtue of their fiefs and not of their knighthood which as only a conventional honor, a distinction of courtesy. It was no real dignity in the state nor influenced the form of government. The laws of chevalry were usages only. When Ed. III instituted the order of the garter, Philip the good duke of Burgundy that of the golden fleece, Lewis the XI that of S^t^ Michael, then as brilliant as the others, the antient chevalry fell, as having no distinctive mark, no chief to confer particular honor on it. The Seigneurs appointed to any dignity took the title of knights, and all those who professed arms took that of *esquire*. The simple title of *knight* which the kings of England give to commoners, without annexing them to any particular order, is derived from the antient chivalry. The *Chevaliers ès lois* instituted themselves of their own accord as did the true Chevaliers at arms, and that alone announced the decline of chevalry. Students took the names of *batchelors*, after having maintained a thesis, and *Docteurs en droit* intitled themselves knights. *15.* VOLT. *c. 97.* In the necessary inequality of conditions, there was never among the antients, nor in nine parts of the inhabitable globe any thing like the establishment of *Nobility* in the tenth part which is Europe. *Villain* comes from *ville*, because formerly there were no nobles but the possessors of castles, and *Roturiers*, de *rupture* de terre, labourage, qu'on a nommé *roture*. Whoever in England has *40 l* revenue in land is a *homo ingenuus*, a *freeholder*. All who are not simple artisans are *Gentlemen*, *15.* VOLT. *Essai sur les mœurs c. 98.* *Tournaments* resembled those antient games mentioned in Homer. They began in Italy under Theodoric who abolished the combats of the gladiators. Il est probable que *tournois* venait d'épée *tournante*, ensis *torneaticus*, ainsi nommée dans la basse latinité, parce que c'était un sabre sans pointe. It was these antient tournaments which gave rise to *coats of arms* about the beginning of the 12 th. century. The knights who were to joust had their bucklers painted with figures according to his (sic) fancy. Hence the knight of the Eagle, of the Lion, etc. The terms of heraldry, which now appear a ridiculous and barbarous jargon, were then common words. The colour of fire was called gueule, azure was sinople, un pieu était un pal, une bande était une fasce, de *fascia* qu'on écrivit depuis face. The number of tournaments was very great till Henry II and the prince Henry of Bourbon-Montpensier lost their lives by them which occasioned their being discontinued, about the year 1560. *Duels* began with the modern monarchies. As a judiciary process they were known only to the Western Christians. The Eastern church did not adopt them nor had the antients this barbarism. Under this custom a man accused of one murder had a right to commit two. These duels must not be confounded with defiances or challenges to single combat between distinguished persons in opposite armies, which have been used among all nations, and which continuing in practice after judiciary duels were abolished, gave rise to private duels, wherein every one took of himself, on the least quarrel, that permission which formerly had been asked of the parliaments, bishops or kings. Duels were much more rare when they were solemny ordered by a court of justice. *15* Volt. *421. Ess. mœurs. c. 100.*

859. Calvin procured Michael Servetus to be burnt alive at Geneva. *16*. Volt. *161.*

860. Astronomy seems first to have been cultivated in India. Callisthenes sent from Babylon to the preceptor of Alexander 1903 years of celestial observations. These went back precisely to 2234 years before the birth of Christ, which is higher than those of the Chinese, *14*. Volt. *34. 215.* They made the earth and other planets revolve round the sun in different orbits. *ib. 35.* They counted in their own history 470.000 years. ib. They and not the Aegyptians invented the Zodiac, ib. *39.* the Solar quadrant, and reflection of light by the moon « *tradidit Aegyptis Babylon, Aegyptus Achivis* », *ib. 40.* The signs of the seven planets and the seven metals are yet in almost the whole earth the same which the Indians invented, *ib. 62.* They from time immemorial divided the sun's annual course into twelve parts. Their weeks were alwais of 7 days, and their days bore the names of the 7 planets. It is difficult to say whether the Indians or Chinese taught the one the other ; but the sciences are certainly more antient with the Indians than Aegyptians, *ib. 241.* The Chinese divided the course of the sun into 365 1/4 parts. They have from time immemorial divided the month into weeks of 7 days. The Indians did so also and the Caldaens conformed to it, from whom it passed to the Jews. It was not adopted by the Greeks, *ib. 223.* The Chinese history goes back 4152 years ascertaining their dates by Astronomical observations, besides several preceding ages to which dates are not precisely fixed, *ib. 197.* The elements of GEOMETRY were known to the Chinese several ages before Euclid reduced them for the Greeks. The famous demonstration of the properties of the right angled triangle, ascribed in the west to Pythagoras, was well known to them above 3960 years ago, *ib. 224.* What was so well known to the Chinese would easily pass to the Indians, among whom Pythagoras, who studied under their Gymnosophists, probably learnt it, *ib. 236.* The progressive notion of LIGHT was discovered by Roemer, it's analysis by Sr. Isaac Newton. A TRANSIT of Venus was first seen by Honox. Drebbel, a Dutch peasant in the beginning of the 17 th. century had the first idea of a THERMOMETER. *Encyclopedie*, Thermometer. Torricellius introduced the BAROMETER. Michael Servetus, a Spaniard discovered the Circulation of the blood long before Harvey. *16.* VOLT. *161.* The Indians *wrote* in hierogliphics many ages before the Egyptians, *14.* VOLT. *36.* The Phenicians invented the ALPHABET in 24 letters, communicated it to the Carthaginians, and these to the Greeks. They were different from the Egyptian letters. *ib. 48. 91.* PRINTING was invented by the Chinese about 2000 years ago. They cut the characters in blocks of wood as Guttenberg did first at Mayence in the 15th. century, *ib. 223.* The Indians invented the CYPHERS we use. ib. *62. 241.* and from them the Arabians borrowed them, ib. 62. The Caldeans knew of the COMPASS, but did not apply it to navigation. *ib. 224.* The property of the MAGNET was discovered about the end of the 13th. century (1) by Flavio Gioia a citizen of Amalfi in the Kingdom of Naples. He invented the compass, and marked the needle with a flower de luce, that being in the arms of the king of Naples who was of the house of France, *16.* VOLT. *224.* The Chinese invented GUNPOWDER. They used it only for artificial fireworks. *14.* VOLT. *223.* Cette invention des Chinois fut-elle apportée en Europe par les Arabes qui trafiquaient sur les mers Arabes ? il n'y a pas d'apparence. C'est un Bénédictin Allemand, nommé Berthold Schwartz qui trouva ce secret fatal. Il y avait longtems qu'on y touchait. Un autre Bénédictin Anglais, Roger Bacon, avait longtems auparavant parlé des grandes explosions que le salpêtre enfermé pouvait produire. Il est bien étrange que cet usage de la poudre, ayant dû changer absolument l'art de la guerre on ne voye point l'époque de ce changement, *15.* VOLT. *262* Gunpowder was discovered in 1380 by Berthold Schwars, a monk of the order of S^{t} Francis, of Fribourg in Brisgau. He shewed the use of it to the Venetians who were then at war with the Genoese. POLYDOR VERG. *de inventione rer. L.2.c.11.* ARTILLERY was not used at the seige of places till the time of Charle V of France, *15.* VOLT. *262.* The English are said to have won the battle of Creci by having some small peices of cannon. The use of artillery

(1) in 1302, *Note of Jefferson.*

and commenced about 10 or 12 years before. *ib.* the Portuguese taught the Chinese the use of Artillery, *14.* Volt. *224.* In the wars of Flanders under Philip II, an Italian engineer used Bombs for the first time. *Notes on the Henriad B. 6.* Bernard Renaud invented Bomb ketches for the purpose of bombarding Algiers. *18.* Volt. *349.* Les Turcs au siège de Candie firent, pour la première fois, des lignes parallèles dans les tranchées. C'est d'eux que nous avons appris cet usage ; mais ils ne la tinrent que d'un Ingenieur Italien, *18.* Volt. *296, Louis XVI.* It was the D. of York, afterwards Jac. 2. who invented the art of giving orders at sea by the different motions of the flag. *18.* Volt. *316. Louis XIV.* (*but this art has been so much improved by Mons^{r} de Pavilon, a French gentleman, that his has almost the merit of a new invention. He takes ten flags of different colours, he makes each colour represent a cypher, thus for instance, white is O, red is 1, bleu 2, green 3, etc. to represent 20 in this case he holds up blue and white on two staffs. to represent 321 he holds up green, blue, red on three different staffs etc. Thus with two staffs he can give 99 signals ; with three 999 : with four 9999 etc. He has a book of signals every one of them is numbered in order, a copy of this being in the hands of every master of a vessel they have only to turn to that when they see a number represented by signal, and they find the corresponding order. If one of these books be taken by the enemy, he shifts the whole system, by giving notice to the captains that green shall now represent O. white 2. blue 3 etc. and so toties quoties*]. The name Bayonette is derived from Bayonne, where they were first made, *Notes on the* 8 *th. B. of the Henriade.* A just taste in Architecture, Sculpture, Paintaing, Music, Poetry, Eloquence, the Art of Writing, and even in Philosophy was first acquired by the Greeks, *14.* Volt. *93.* Cimmabué sans aucun secours était comme un nouvel inventeur de la peinture au treizième siècle. Le Giotto fit des tableaux qu'on voit encore avec plaisir. Brunelleschi commença à réformer l'architecture Gothique. Gui d'Arezzo (Guido Aretine) longtems auparavant avait inventé les nouvelles notes de la musique à la fin du onzième siècle. On fut redevable de toutes ces belles inventions aux Toscans. *15.* Volt. *302-316.* The Indians invented Chess, *14* Volt. *62.240.* The Chinese have had the use of Clocks from the highest antiquity, *14.* Volt. *223.* There were some in Italy in the 13 th. century, Volt. *302-316.* They first made Silk *and* Paper, *ib. 222.* Paper of *linen* was invented in the beginning of the 14 th. century which was 107 years before the invention of printing. *15.* Volt. *302-316.* The Chinese made Glass 2000 years ago. *14.* Volt. *222.* The Venetians alone had the secret of making *looking glasses* in the 13 th. century. Spectacles were invented about the end of the 13 th. century, by Alexander Spina. Windmills were known in Italy about the same time. They are spoken of by La Flamma in the 14 th. century, and are not spoken of before. They were known long before among the Greeks and Arabians. They are mentioned by Arabian poets in the 7 th. century. Chimneys were not in use in the 13 th. century. A fire was made in the middle of the room and a hole to let out the smoke. The best citizens used splinters of wood for light in the time of Frederic Barbarossa and Frederic II. Candles were considered as luxury in the time of La Flamma. Shirts were made of Woollen and not of Linen temp. Fred. Barb. and Frederic II, *15.* Volt. *302-316.*

861. Il y avait un Abbé des conards, un roi des ribauds. Point de ville qui n'eut des confréries d'artisans, de bourgeois, de femmes ; les plus extravagantes cérémonies y étaient érigées en mystères sacrés ; et c'est de-là que vient la société des *Francs-maçons*, échappée au tems qui a détruit toutes les autres, *15 Voll. 316.*

862. The seventh day, or Saturday was the *Sabbath* of the Jews and supposed by them to be the true hebdomadary of the day of rest from the work of creation. Jesus was crucified on the Friday, and rose on the Sunday. So says Ignatius. *Epil. to the Trallians.* Τῃ ουν παρασκευῃ — εσταυρωθη· το σαββατον ὑπο γην μενει εν τῳ μνημειῳ·

επεφωσκουσης κυριακης ανεστη εκ των νεκρων. — περιεχει ουν ἡ μεν παρασκευη το παθος· Το σαββατον την ταφην· ἡ κυριακη την αναστασιν. The Christians therefore transferred the observance of the Sabbath from the 7 th to the 1st day of the week in honour of the founder of their religion, that being the day of his resurrection. It was with them doubtless a day of rest, but it seems moreover to have been a day of relaxation and festivity from what Ignatius says in another epistle. « και μετα το Σαββατισαι ἑορταζετω πας φιλοχριστος την κυριακην την αναστασιμον. *Ignat epist. to the Magnesians*. Ignatius was a disciple of the apostles, and [particularly of S^t John] (1) ordained by S^t Paul. The times of the birth and passion of Christ, with such like *niceties*, being not material to religion, were little regarded by the Christians of the first age. They who began first to celebrate them placed them in the cardinal periods of the year ; as the annunciation of the Virgin Mary on the 25th of March which was then the Vernal equinox ; the feast of John Baptist on the 24th of June which was the Summer soltice ; the feast of S^t Michael on Sep. 29 which was the autumnal equinox ; and the birth of Christ on the winter soltice Decemb. 25. — So also the entrance of the sun into all the signs in the Julian calendar, they placed the days of the saints, as the conversion of Paul on Jan 25. when Θ entered ♒. S^t Matthias on Feb. 25, when he entered ♓. S^t Mark Apr. 25. when he entered ♉ Corpus Christi May 26, when he entered ♊ S^t James July 25, when he entered ♋. S^t Barthol. Aug. 24, when he entered ♍ Simon and Jude Oct, *28*, when he entered ♏. — All which shews that these days were fixed in the first X^n calendars by mathematicians at pleasure, without any ground in tradition ; and that the Christians afterwards took up with what they found in the Calendars. Neither was there any certain tradition about the years of Christ. *Newton on the prophecies of Daniel*. 144.

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(1) Crossed out in the mss.

As to the Lord's day the Constitutions of the Apostles say :

Πασαν κυριακην, επιτελουντες συνοδους, ευφραινεσθε· ενοχος γαρ αμασσιας εσται ὁ την κυριακην νηστευων, ἡμεραν αναστασεως ουσαν — ἡ ὁλως ἡμεραν ἑορτης κυριου κατηφων· ευφρανθεναι γαρ δει εν αυταις, αλλ' ου πενθηναι. Διαταγαι των ἁγιων αποστολων δια Κλημεντος. E. 20. το σαββατον μεν τοι και την κυριακην εορταζετε· οτι το μεν, δημιουργιας εστιν ὑπομνημα, ἡ δε αναστασεως VII 23.

863. Bishops were eligible by the people in the earlier ages of Christianity, επισκοπον — ὑπο παντος του λαου εκλελεγμενον. ὁυ ονομαθεντος και αρεσαντος, συνελθων ὁ λαος ἁμα τῳ πρεσβυτερῳ και τοις παρουσιν επισκοποις εν ἡμερᾳ κυριακη συνευδοκειτω, etc. *Apostol. constit.* VIII. 4.

864. The Scriptural books declared holy in the Apostolic constitution are of the old covenant the 5 books of the Moses, viz. *Genesis*, *Exodus*, *Leviticus*, *Numbers*, *Deutoronomy* ; 1 *of Joshua*, 1° of the *Judges*, 1° of *Ruth*, 4. of *the kings*, 2 of the *Chronicles*, 2 of *Esra*, 1° of *Esther* (1° of *Judith*) 3° of the *Maccabees*, 1° of Job, 150 psalms, 3 books of *Salomon* viz. *Proverbs*, *Ecclesiastes*, and the *Song of songs*, 16 prophets : the wisdom of Sirach is also recommended : of the new covenant, the 4 gospels of Matthew, Mark, Luke and John, the 14 epistles of Paul, 2 of Peter, 3 of John, 1 of James, 1 of Jude, 2 of Clement and the Constitutions by Clement in 8 books (which last are not to be published before all because of the mysteries therein contained) and the acts of the apostles. This work is thus concluded τελος διαταγων των ἁγιων αποστολων δια Κλημεντος, καθολικης διδασκαλιας *Apost. Const. VIII. 85.*

865. *Id solum fieri posse, quod aut verum sit, aut futurum sit verum ; at quidquid futurum sit, id dicit fieri necesse est, et quidquid non sit futurum, id negat fieri posse.*

866. The land of every man is, in the law inclosed from other, though it lies in the open field : and therefore if a man do a trespass therein, the writ shall be *Quare clausum fregit. Dr. and St. Dial.* 1. c. 8. Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbor, though he knows not that they were there. *D^r and S^t. Dial. 1. c.* 9.

867. Methods of removing causes from the County to the Superior courts. (See, page 347.)

868. SECTA or SUICT in law language means witnesses to prove his action, as in the Counts of Writs of right they were wont to declare « *el hoc paralus sum verificare per hunc liberum hominem meum. A. B. and si quid* » etc., which was a tender of battel as the « *inde producil* SECTAM » is of suit, or witnesses. The proofs of both sides are called SECTA. In *44 H. 3.* in Replevin the fed. pleads « non *cepil etc. el hoc offerl defendere conlra ipsum el* SECTAM *suam sicut curia consideranerit, el quia praedilus Gilberlus* (*pl.*) *nullam seclam producil versus praed.* W. (*def.*) *consideralum csl* » etc. Fortescue *de laud. c. 21. in nolis* (1).

869. Brompton c. 957 (2). says « *de supradiclis tribus legibus*, viz MENCHENALAGA WESTSEXENELAGA and DANELAGA *isle rex Edwardus III* (the Confessor) *unam* LEGEM COMMUNEM editit, *quæ leges Edwardi usque hodie vocanlur* », which helps us to the original meaning of the phrase COMMON LAW (and different from that in which it is now taken) which was therefore called COMMON, because it extended to all England ; whereas before, different parts had been ruled by different laws. Pref. to Fortesc. de *laud.* XXIX but S^r J. Fortescue Aland gives a different account in his *preface to Forlesc. of monarchies*. He sais K. Alfred who began his reign in 871, is called the great founder of the English laws. He being the first sole monarch after the heptarchy collected the substance of the laws of all the former Saxon kings, from king Æthelbert to his time who

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(1) Fortescue. *De Laudibus Legum Angliæ*, printed several times after 1537, and translated 1737.

(2) *Chronicon Johannis Brompton*, a compilation of doubtful authorship, published London, 1652.

In Chancery	1. Certiorari	2. Appeal	3. Supersedeas
must be of £ 10. value, or concern lands.	1. Ex gratia, of court dnr^g term and of 2. Judges in vacation.	1. of right.	1. Ex gratia.
	2. may be granted at any time before final decree.	2. must be ent^d in County c^t dur^g the session at which decree pronounced or with clerk of Chancery within 1 month after.	2. may be granted at any time after final decree below.

Common Law	I. Hab. corp	II. Certiorari	III. Appeal	IV. Supersedeas	V. Writ of Error
	1. of Right.	1. of grace, of c^t dur^g term or 2 Judges in vacation.	1. of Right.	1. Ex gratia of c^t in term or 2. Judges in vacn	1. Ex gratia Curiae.
	2. must be of £ 10. value or concern lands.	2. must be of £ 10. value or concern lands.	2. must be of £ 10. value or concern lands.	2. must be of £ 10. value or. concern lands.	2. may be for any sum above 25/.
	3 must be sued while the body is actually in jail.	3. may be granted at any time before final jdment.	3. must be on final jdmt or 1. month after.	3. may be grant^d at any time after final jdmt.	3. may be grant^d at any time after final jdmt.
	4. may be sued either in term or vacn of G. C.	4. may be sued either in term or vacn of G. C.	4. may be sued either in term or vacn of G. C.	4. may be sued either in term or vacn of G. C.	4. can be sued only in term of G. C.

where kings only of parts of the land, into one body and so formed on entire Codex or book of laws. — Which being made up of such a variety of different laws, enacted by the several Saxon kings, reigning over distinct parts of the kingdom ; and these several laws, which then affected only parts of the English nation, being now reduced into one body, and made to extend equally to the whole nation, it was very proper to call it the COMMON LAW of England, being now first of all made Common to the whole English nation. This JUS COMMUNE or COMMON LAW was soon after called in Saxon the FOLC-RIGHT, or people's right — It is affirmed by some that K. Edw. the Confessor perceiving this kingdom to be governed by a threefold law, Danelaga Saxon-laga, and MERCENLAGA and that mulcts and fines were to be set differently upon his subjects, according to those laws, reduced them all to one and called it the Common law of England. But those laws could not be at that time consolidated and thrown into one body of laws ; because each of those species of laws were in force after, and are to be found not only in Edward the Confessor, but all over William the first's laws, and not only mulcts and fines, but customs and usages set out to be observed according to those different laws. Which shews that this could not be the original of the Common law : because these laws were still in being, and were severally observed in several places in the same manner, as at this day several particular customs are, which are peculiar to some particular countries and places and yet that does not hinder them from being called part, of the Common law of England. So that it must be meant only, that Edward the Confessor made a collection out of those laws then extant as Alfred did before him, and then ordering those to be observed, which had not been observed in the short reigns of Harold and Hardicanute, he may well enough be called the restorer of the English laws. — The COMMON LAW then was formed and established by K. Alfred, and had the name of Folc-Right, which when the language came to be altered, was called the Common-Law of England. Fortesc. *of monarchies*. XVIII.

870. Gabelle comes from the Saxon Gafel, which is a tribute or tax. — Hence comes our law word Gavelkind, and not from the fanciful etymology of Gifeal-Kyn, give all in kind. The true meaning of Gavelkind is Land subject to tribute or taxes, from Gafol or Gafel a tax, and it was called by the Saxons Gafol-Land to distinguish it from land held by knights service, from which, and all the slaveries thereto incident, it was free, by the payment of this Gafol, or tribute. Fortesc. A's *notes to Fortesc. on monarchies*. 72.

871. Y^e [y^e] this y is plainly a corruption of the Saxon th, wrote thus ; the upper part of which being crossed with a transverse line thus stood for *that*. Hence a *y* with an *e* and *t* set above it, stood for *the* and *that*, and so continues to this day. Fortesc. A's *notes on Fortesc. on Monarchies*. 59.

872. The antient fathers of our country, the pious Saxon kings probihited by an express law, not only to exercise any calling, but to do or transact any wordly business on the Sabbath day ; and this law not being ever repealed, as we know of, nor (as it is to be hoped) ever grown into such universal disuse as to induce a probability of a repeal, why should it not be the Common law of England ? Fortesc. A's *pref. to Fortesc. of monarchies*, XLVIII. Sunnan daeges ceapinge gif hwa aggune, tholie thaer ceaper. XII ore mid Denum. XXX scill. mid Englum. *si quis die dominica mercari praesumat, perdat mercatum and XII ovas apud Danos et XXX solidos apud Anglos. Foedus Eadweardi and Guthruni apud Wilk. Sax.* Ll. 52. The *stat. 27. H. 6. c. 5*, ordains that « all manner of fairs and markets in the s̃d principal feasts and Sundays and Good Friday shall cease from all shewing of any goods, or merchandize (necessary victual except) on pain of forfeiture of all the goods aforesaid ». In the Y. B. 12, E. 4. fo. 8, is an action of trespass for goods taken, def.

pleads a purchase in open market in London, and a prescription of the right of the city to hold a market *every day in the week*. The pl. demurs and his counsel argues that this prescription is not good, it appearing that no market can be so held, for in *die dominica* no market can be held by the common law, for it is against the law of god. The king cannot grant a market to be held on the Lord's day. If a man counts on a contract that he was bound to do such a thing on *Sunday*, it is void, for the contract is against law. Again the prescription is void as being against the stat, *27*. H. *6*. *c*. *5*, that merchandise shall cease to be shewn on Sunday, and where it says that it shall cease to be shewn it takes away the effect of the market, for no sale in market shall bind a man unless the thing be shewn and present in the market. The def's counsel answered as to the prescription being against the law of god, etc. « Devant le incarnation fuit ley et custome, etc., » and then also the sabbath was on the Saturday, but now it is changed by the church to Sunday, and now on Saturday such markets may be held, and tho it be against the law of the holy church to hold market on a Sunday it belongs to them to punish the buyers and sellers, but as to the temporal law such a market may well be beld on the Sunday ; [and as to the prescrition] (1) that tho' it is to be a sin to hold the market on Sunday, yet *quoad jus naturale* it is good, and a contract made on that day is good, and as to the prescription being against the stat. *27*. H. *6*, that statute willing that merchandize shall cease to be shewn on Sunday is sub *poena forisfacturum*, so it does not prohibit the market to be held, but gives a penalty, which penalty will be forfeited and the purchase in market good. The opinion of the court being against the pl. he was nonsuited. Ld Coke *2d. inst. 264*, having observed that Sundays were not juridical days adds « this was the antient law of England and extended not only to legal proceedings but to *contraics etc,* » and cites the *Foed.* Edw and Guthr. *supra.*

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(1) *Crossed out in the mss.*

873. (1) in *Quare imp.* in *C. B. 34.* H. *6. fo. 38.* the def. Bp of Lincoln pleads that the church of the pl. became void by the death of the incumbent, that the pl. and I. S. each pretending a right, presented two several clerks, that the church being thus rendered litigious he was not obliged by the Ecclesiastical law to admit either until an inquisition *de jure patronatus* in the Ecclesiastical court, that by the same law this inquisition was to be at the suit of either claimant, and was not *ex officio* to be instituted by the bp and at his proper costs, that neither party had desired such an inquisition, that 6 months passed whereon it belonged to him of right to present as on a lapse, which he had done. The pl. demurred. A question was how far the Ecclesiastical law was to be respected in this matter by the Common law court ? and Prisot C. J. on the course of his argument uses this expression « a tiels leis que ils de seint eglise ont en ancien scripture, covient à nous a donner credence ; car ceo Common ley sur quel touts manners leis sont fondes et auxy Sir, nous sumus obliges de conustre lour ley de saint eglise ; et semblablement ils sont obliges de conustre notre ley. et Sir, si poit apperer or a nous que l'evesque ad fait come un Ordinary fera, en tiel cas, adonq nous devons ceo adjuger bon, ou autrement nemy, etc ». It does not appear what judgment was given. Y. *B.* ubi supra. S. C. Fitzh. *abr. Qu. imp. 89. Bro. abr. Qu. imp. 12.* Finch mistakes this in the following manner « to such laws of the church as have warrant in *holy scripture*, our law giveth credence », and cites the above case and the words of Prisot in the margin. Finch's *law* B. 1. *c. 3.* published 1613. Here we find « ancien scripture » converted into « holy scripture » whereas it can only mean the antient written laws of the church. It cannot mean the Scriptures 1. Because the « ancien scripture » must then be understood to mean the bible in opposition to the new testament and to the exclusion of that which would be absurd, and contrary to the wish of those who cite this passage to prove that the scriptures or Christianity is a part of the Common law. 2. Because Prisot sais « ceo [est] Common ley sur quel touts manners leis sont fondes ». Now it is true that the Ecclesiastical law, so far as admitted in England derives it's authority from the Common law, but it would not be true that the scriptures so derive their authority. 3. The whole case and arguments shew that the question was how far the Ecclesiastical law in general should be respected in a Common law court; and in Bro. abr. of this case Littleton says « les juges del common ley prendra conusans *quid est lex ecclesiae vel admiralitatis et hujusmodi* ». 4. Because the particular part of the Ecclesiastical law then in question, viz. the right of the patron to present to his advowson not founded on the law of god, but subject to the modification of the law-giver and so could not introduce any such general position as Finch pretends. Yet Wingate [in 1658] thinks proper to erect this false quotation into a maxim of the common law, expressing it in the very words of Finch, but citing Prisot. Wing. Max. 3. Next comes Sheppard [in 1675] who states it in the same words of Finch, and quotes the *Y. B.* Finch, and Wingate. 3 Shep. *abr. tit' Religion.* In the case of the King and Taylor, Sr Matthew Hale lays it down in these words « Christianity is parcel of the laws of England. » 1. Ventr. *293. 3.* Kel. *607.* but he quotes no authority. He was a sound lawyer when not biassed by his belief in Christianity or Witchcraft, in both of which his faith was very perfect. He is famous for hanging witches. So strong was this doctrine become in 1728, by additions and repetitions from one another that in the case of the king v. Woolston the court would not suffer it to be debated whether to write against Christianity was punisheable in the temporal courts at *Common law*, saying it had been so settled in Taylor's case ante. 2. Spa. *834*, therefore Wood in his institute lays it down that all blasphemy and Profaneness are offences by the *common law* and cites Strange ubi supra. Wood. *409*, and Blackstone [about *1763*] repeats in the words of Sr. Matthew Hale that « Christianity is part of the laws of England » citing Ventr. and Strange ubi supra. 4. Blackst. *59*. Ld. Mansfield qualifies it a little by saying that « the essential principles of revealed religion are part of the Common law » in the case of the Chamberlain of London v. Evans. 1767, but he cites no authority and leaves us at our peril to find out what in the opinion of the judge, and according to the measure of his foot or his faith are those essential principles of revealed religion obligatory on us as a part of the Common law. Thus we find this string of authorities when examined to the beginning all hanging on the same hook a perverted expression of Prisot's or on nothing, for they all quote Prisot, or one another, or nobody. Thus Finch quotes Prisot ; Wingate also ; Sheppard quotes Prisot, Finch and Wingate ; Hale cites nobody ; the court in Woolston's case cite Hale ; Wood cites Woolston's case ; Blackstone that and Hale ; and Ld. Mansfield like Hale ventures it on his own authority. In the earlier ages of the law, as in the Year-books for instance, we do not expect much recurrence to authorities by the judges, because in those days there were few or none such made public ; but in later times we take no judge's word for what the law is further than he is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who happens to be the particular subject of it, but it cannot alter the law. Tho the Common law be termed *Lex non scripta*, yet the same Hale tells us « when I call those parts of our laws *Leges non scriptæ*, I do not mean as if all those laws were only oral, or communicated from the former ages to the latter merely by word, for all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty. They are for the most part extant in records of pleas, proceedings and judgments, in books of reports, and judicial decisions, in tractates of learned men's arguments and opinions, preserved from antient times and still extant in writing, » Hale's H. C. L. *22*. Authorities for what is Common law may therefore be as well cited as for any part of the *Lex scripla*, and there is no better instance of the necessity of holding the judges and writers to a declaration of their authorities than the present ; where we detect them endeavoring to make law where they found none, and to submit us at one stroke to a whole system no particle of which has it's foundation in the Common law, for we know that the Common law is that system of law which was introduced by the Saxons on their settlement in England, and altered from time to time by proper legislative authority from that to the date of the Magna charta which terminates the period of the Common law, or *Lex non scripla*, and commences that of the Statute law, or *Lex scripla*. This settlement took place about the middle of the 5th century, but Christianity was not introduced till the 7th, century, the conversion of the first Christian king of the heptarchy having taken place about the year 598, and that of the last about 686. Here then was a space of 200 years during which the Common law was in existence, and Christianity no part of it. If it ever was adopted therefore into the Common law it must have been between the introduction of Christianity and date of the Magna charta, but of the laws of this period we have a tolerable collection by Lambard and Wilkins probably not perfect, but neither very defective ; and if any one chuses to build a doctrine on any law of that period supposed to have been lost, it is incumbent on him to prove it to have existed and what were it's contents. These were so far alterations of the common law and became themselves a part of it, but none of these adopt Christianity as a part of the common law. If therefore from the settlement of the Saxons to the introduction of Christianity among them that system of religion could not be a part of the Common law, because they were not yet Christians, and if, having their laws from that period to the close of the Common law, we are able to find among them no such act of adoption, we may safely affirm (tho' contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was a part of the Common law. Another cogent proof of this truth is drawn from the silence of certain writers on the common law. Bracton gives us a very complete and scientific treatise of the whole body of the common law. He wrote this about the close of the reign of H. 3. a very few years after the date of the *Magna charta.* We consider this book as the more valuable as it was written about the time which divides the common and statute law and therefore gives us the former in it's ultimate state. Bracton too was an ecclesiastic; and would certainly not have failed to inform us of the adoption of Christiany as a part of the Common law had any such adoption ever taken place, but no word of his which intimates any thing like it has ever been cited. Fleta and Britton who wrote in the succeeding reign (of. E. I.) are equally silent; so also is Glanvil an earlier writer than any of them (viz. temp. H. 2) but his subject perhaps might not have led him to mention it. Justice Fortescue Aland, who possessed more Saxon learning than all the judges and writers before mentioned put together, places this subject on more limited ground. Speaking of the laws of the Saxon kings, he sais, « the ten commandments were made part of their law: and consequently were *once* part of the law of England: so that to break any of the X commandments, was then esteemed a breach of the Common law of England and why it is not so now, perhaps it may be difficult to give a good reason », *Pref. to Fortesc. rep.* XVII. Had he proposed to state with more minuteness how much of the scriptures had been made a part of the common law; he might have added that in the laws of Alfred where he found the X commandments, two or three other chapters of *Exodus* are copied almost verbatim, but the adoption of a part proves rather a rejection of the rest as municipal law. We might as well say that the Newtonian system of philosophy is a part of the Common law, as that the Christian religion is. The truth is that Christianity and Newtonianism being reason and verity itself in the opinion of all but infidels and Cartesians, they are protected under the wings of the Common law from the dominion of other sects, but not erected into dominion over them. An eminent Spanish physician affirmed that the launcet had slain more men than the sword. Doct^{r}. Sangrado on the contrary affirmed that with plentiful bleedings and draughts of warm water every disease was to be cured. The Common law protects both opinions, but enacts neither into law, *see post. 879.*

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(1) Reproduced as well as 879 with slight changes in a letter to Thomas Cooper, Feb. 10, 1814, and given as having been written « half a century ago ».*M.E., XIV, 85 ff.*

874. The word GAFAEL or gavel (according to Taylor) comes from the British verb GAFAELU, tenere, prehendere. GAFAEL-SWYDDOC, in Welsh, is an officer of arrest from GAFAELU, to take or seize, and SWYDDOG an officier. GEFAEL is a pair of forceps or fire-tongs. He therefore considers GAVEL-KIND land, as TENURE land. He considers all partible lands as gavelkind, and that probally all lands among the Britains were partible. Taylor's *gavelkind* p. 93. He sais there is scarce a country in England but hath this tenure more or less ; that he knows there is much in Shropshire, some in Norfolk ; that it is in South-Wales as well as North-Wales, and in other places as well as these. That it prevails in Ireland under the name of the Breton law *ib. 151. 152.* That partible lands are also to be found in Scotland. *ib. 159.* To disprove Somner's exposition of GAVEL, to wit., RENT, with whom agrees also Spelman and Fortescue he affirms that he knows much Gavelkind land which pays no rent, that particularly the lands in Urchenfeild are in that situation. *ib. 123.* see ante *735. 848. 870.* Urchenfeild is a hundred in Wales. *ib. 109.*

875. To shew the affinity of the several dialects of the old BRITISH, Taylor points out this gradation that a man of Base Britany [Armorica] and a Cornish-man understand one another, a Cornish-man and a Welsh-man, a Welsh-man and one of the isle of Man [Manks] a Manks and an Irish-man, an Irish-man and a Highlander, Taylor's *Gavelkind.* 146. (1).

876. If beasts stray away and be taken up and proclaimed and the owner hath not heard of them within the year and day, tho he made sufficient diligence to have heard of them, yet he loseth the property. *Dr., and Stud. 291.*(2)

877. Tho' a man wave the possession of his goods, and saith he forsaketh them yet the property remaineth still in him and he may seize them after when he will, and if any man in the meantime put the goods in safeguard to the use of the owner, he shall be allowed for his reasonable expences as of goods found, but he shall have no property in them, no more than in goods found. *Dr., and Stud. 292.*

878. The following passage from Dion. Cassius. L. 37. *c.* 18. 19 is very remarkeable as it accounts for the division of time into weeks of 7 days, and for the names and order of those days, as also the general adoption of that division by the nations connected or acquainted with the Romans. Speaking of the Jews, of their worshipping one god only of whom they permitted no image to be made, of their disrespect for all other gods, of their consecration of the *dies Saturni* to rest, he proceeds thus : « The ascription of the days to the seven stars, called Planets, is an institution of the Egyptians, and now prevails among all men, but not of very antient date, for the antient Greeks knew nothing of it, as far as I have been able to learn, but since it is now recieved by all others, and particularly by the Romans, and is considered as a custom of their ancestors, I will say a few words concerning it, and how it became established. I have heard two accounts, not difficult of explanation, and holding to particular theories ». [He then states the first of these, deducing the names of the days from certain harmonical arrangements, and proceeds] « The other account is this: numbering the hours of the day and night, they [the Egyptians] ascribed the lst hour to Saturn, the 2d, to Jupiter, the 3d., to Mars, the 4th, to the Sun, the 5th, to Venus, the 6th, to Mercury, and the 7th, to the Moon, according to the order of their orbits, as understood by the Egyptians, and doing this again and again, till you are through the 24 hours, you will find the 1st, hour of the 2d, day fall to the Sun; and going through the 24 hours of that day in the same order, the 1st, hour of the 3d, day will fall to the Moon; and so proceeding through the others, each day will fall to it's proper divinity ». It seems then that the Egyptians, considering the Earth as occupying the centre of the Planatary system, and that round that revolved Saturn, Jupiter, Mars, the Sun, Venus, Mercury and the Moon in the order here named, and agreeably to the Ptolemæan system, they ascribed to these 7 planets, and in the same supposed order of their orbits, the hours of time successively and for ever. So that having allotted to Saturn the 1st hour of some given day, they ascribed the 2d, to Jupiter, the 3d, to Mars, the 4th, to Sol, the 5th, to Venus, the 6th, to Mercury, the 7th, to Luna, the 8th, again to Saturn, the 9th, to Jupiter and so on for ever; pursuing this allotment, it will be found that the II d, day began with the hour allotted to Jove; the III d, day began with an hour allotted to Mars; the IV th, to Sol; the V th, to Venus; the VI th, to Mercury, the VII th, to Luna, the VIII th, to Saturn, and so on in a circle for ever; and they therefore called every day by the name of the planet on whose hour it entered. The Jews seem to have brought this, as they did many others of their institutions from Egypt. The Romans also adopted it, and from them it passed to the Northern nations, who adopted some of the Roman names, to wit., Saturday, Sunday, Monday, and adapted others to their own Mythology, calling the *dies Martis*, Tyrsdag, Dan., Tisdag Sued., Tuesday Eng., their god Tyr, answering to the Mars of the Romans. [Mallet's *North. antiq. c. 6. pa. 99.* English edñ] The *dies Mercurii* they called Odinsdag. Sued., Woensday Low Dutch, Wodensdag Anglo-Sax., Wednesday Eng. from a correspondence of character between Mercury and their Woden. *Dies Jovis* they called Thorsdag Sax., Torsdag Sued., Thursday Eng.; their Thor, being like the Jupiter of the Romans the god of Thunder, and the Low Dutch call it Donderdag, [*ib.* p. *91.96*] and the *dies Veneris* they called Freytag, Friday or Frea's day; Frea the wife of Odin being the Venus of the North, *ib. 94.95.* The following scheme will shew how the 1 st, hour of every day through the week fell. (*See tabulation p.* 360.)

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(1) John Taylor : *Elements of the Civil Law*, London, 1755.

(2) *Doctor and Student*, the treatise of Saint Germain, first published in Latin under the title of *Dialogus de Fundamentis Legum* 1523.

879. Houard in his *Coutumes Anglo-Normandes*, I. 87, notices the falsification of the laws of Alfred by prefixing to them 4 chapters of the Jewish law, to wit. the 20th, 21st, 22d, and 23d, chapters of *Exodus*; to which he might have added the 15th, of the *Acts of the Apostles* v. 23. to 29. and precepts from other parts of the Scripture. These he calls a hors d'œuvre of some pious copyist. This awkward Monkish fabrication makes the preface to Alfred's genuine laws stand in the body of the work : and the very words of Alfred himself prove the fraud ; for he declares in that preface that he has collected these laws from those of Ina, of Offa, Aethelbert and his Ancestors, saying nothing of any of them being taken from the scripture. It is still more certainly proved by the inconsistencies it occasions. For example, the Jewish legislator, *Exod. XXI. 12. 13.*

	Saturday Ist day				Sunday IId day			Monday IIId day				Tuesday IVth day			Wednesday Vth day				Thursday VIth day			Friday VIIth day			Saturday VIIIth day				Sunday IXth day
Saturn	1	8	15	22	5	12	19	2	9	16	23	6	13	20	3	10	17	24	7	14	21	4	11	18	1	8	15	22	
Jupiter	2	9	16	23	6	13	20	3	10	17	24	7	14	21	4	11	18	1	8	15	22	5	12	19	2	9	16	23	
Mars	3	10	17	24	7	14	21	4	11	18	1	8	15	22	5	12	19	2	9	16	23	6	13	20	3	10	17	24	
Sol	4	11	18	1	8	15	22	5	12	19	2	9	16	23	6	13	20	3	10	17	24	7	14	21	4	11	18	1	
Venus	5	12	19	2	9	16	23	6	13	20	3	10	17	24	7	14	21	4	11	18	1	8	15	22	5	12	19	2	
Mercury	6	13	20	3	10	17	24	7	14	21	4	11	18	1	8	15	22	5	12	19	2	9	16	23	6	13	20	3	
Luna	7	14	21	4	11	18	1	8	15	22	5	12	19	2	9	16	23	6	13	20	3	10	17	24	7	14	21	4	

see also Xiphilinus L. 1. *Pompeīus.*

14, (copied by the *Pseudo-Alfred* § *13.*) makes murder, with the Jews, death, but Alfred himself *Le. XXVI* punishes it by a fine only, called a Weregild, proportioned to the condition of the person killed. It is remarkable that Hume (*Append. I.* to his history) (1) examining this article of the *laws of Alfred*, without percieving the fraud, puzzles himself with accounting for the inconsistency it had introduced. To strike a pregnant woman so that she die, is death by *Exod. XXI. 22. 23* and *Pseudo-Alfr.* § *18*, but by the *laws of Alfred IX*, pays a weregild for both the woman and child. To smite out an eye or a tooth *Exod. XXI. 24. 27 Pseud. Alfr.* § *19. 20*, if of a servant by his master, is freedom to the servant ; in every other case retaliation, but by *Alfred Le. XL*, a fixed indemnification is paid. Theft of an ox, or a sheep, by the Jewish law *XXII. Exod. 1.* was repaid five-fold for the ox, and fourfold for the sheep ; by the *Pseudograph* § *24*, double for the ox, and fourfold for the sheep : but by *Alfred LI. XVI*, he who stole a cow and calf was to repay the worth of the cow, and 40 /, for the calf. Goring, by an ox, was the death of the ox, and the flesh not to be eaten ; *Exod. XXI*, *28 Pseud. Alfred.* § *21*; by *LI. Alfr. XXIV*, the wounded person had the ox. This *Pseudograph* makes municipal laws of the ten commandments § *1-10*, regulates concubinage, § *12*, makes it death to strike, or to curse father or mother, § *14. 15*, gives an eye for an eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe, § *19* ; sells the thief to repay his theft, § *24* ; obliges the fornicator to marry the woman he has lain with, § *29* ; forbids interest on money, § *35* ; makes the laws of bailment § *28*, very different from what L^{d},. Holt delivers in Coggs v. Bernard *ante 92*, and what S^{r},. Wm Jones tells us they were : and punishes witchcraft with death, § *30*, which Sr,. Matthew Hale 1. *P. C. ch. 33.* declares was not a felony before the Stat. 1. Jac. c. 12. It was under that statute, and not this forgery that he hung Rose Cullender, and Amy Duny., 16. *Car. 2.* (1662) on whose trial he declared « that there were such creatures as witches he made no doubt at all ; for 1st, the Scriptures had affirmed so much. 2d, the wisdom of all nations had provided laws against such persons — and such hath been the judgment of this kingdom as appears by that act of parliament which hath provided punishments proportionable to the quality of the offence, » and we must certainly allow greater weight to this position « that it was no felony till James's statute, » deliberately laid down in his *H. P. C.* a work which he wrote to be printed, and transcribed for the press in his life time, than to the hasty scriptum that « at *Common law* Witchcraft was punished with death, as Heresy, by writ *de hæretico comburendo,* » in his *Methodical Summary of the P. C. pa. 6*, a work « not intended for the press, nor fitted for it, and which he declared himself he had never read over since it was written, » *Preface.* Unless we understand his meaning in that to be that witchcraft could not be punished at Common law *as witchcraft*, but as a *hæresy.* In either sense however it is a denial of this pretended law of Alfred. Now all men of reading know that these pretended laws of homicide, concubinage, theft, retaliation, compulsory marriage, usury, bailment, and others which might have been cited from this Pseudograph, were never the laws of England, not even in Alfred's time ; and of course that it is a forgery. Yet, palpable as it must be to a lawyer, our judges have piously avoided lifting the veil under which it was shrouded. In truth, the alliance between Church and State in England, has ever made their judges accomplices in the frauds of the clergy ; and even bolder than they are : for, instead of being contented with these four surreptitious chapters of *Exodus*, they have taken the whole leap, and declared at once, that the whole bible and testament, in a lump, make part of the Common law; *ante* 873. The first judicial declaration of which was by this same S^{r}. Matthew Hale. And thus they incorporate into the English code, laws made for the Jews alone, and the precepts of the gospel, intended by their benevolent author as obligatory only *in foro conscientiæ* ; and they arm the whole with the coercions of Municipal law. In doing this too they have not even used the Connecticut caution of declaring, as is done in their blue laws, that the laws of god shall be the laws of their land, except where their own contradict them ; but they swallow the Yea, and the Nay together. Finally in answer to Fortescue Aland's question why the ten commandments should not now be a part of the Common law of England ? we may say that they are not, because they never were made so by legislative authority ; the document which imposed that doubt on him being a manifest forgery.

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(1) David Hume, *History of England*, 1752 + , 2 vols 1762, 8 vols. 1763, 1770 etc.

880. *Lex Romana de seditiosis in crucem tollendis extat* L. 28 Dig. de *poenis*, an error of the press for L. 48. where it will be found tit. 19. § 28. 3. « *capite plectendi cum sæpius seditiose, et turbulente se gesterint, et aliquotiens adprehensi, tractati clementius, in eadem temeritate propositi perseveraverint,* » under which law Jesus is said to have been crucified. 1. *Codex Apocryph.* Fabricii. *Nicodem. Evangel.* 9. pa. 258. et Not.

881. *Tanta religio, et ea magna ex parte externa, civitatem incessit, ut aut homines, aut dii repente alii viderentur facti. Nec jam in secreto modó atque intra parietes abolebantur Romani ritus, sed in publico etiam, ac foro, Capitolioque mulierum turba érat nec sacrificantium, nec precantium deos patrio more. Sacrificuli ac vates ceperant hominum mentes*; — *et quæstus ex alieno errore facilis, quem velut ex concessæ artis usu exercebant.* — *M. Atilio prætori urbis negotium ab senatu datum est ut his religionibus populum liberaret, is, et in concione senatus consultum recitavit, et edixit, ut quicunque libros vaticinos precationesve, aut artem sacrificandi conscriptam haberet* *eos libros omnes litterasque ad se ante Kalendas Apriles deferret* ; *neu quis in publico sacrove loco, novo aut externo ritu sacrificaret.* Liv. *Lib. 25. c. 1.*

882. Where a verdict is neither against evidence nor law no new trial should be granted. There is no particular time fixed for demanding payment of a bill of exchange. The jury is to decide on the convenient time or the reasonable diligence which the holder of the bill is to use. Hankey. v. Trotman. *1.* W. Blackst. *rep. 1* (1).

883. A person arraigned is not obliged to hold up his hand. K. v. Radcliffe. 1. Bl. *rep. 3.*

884. The pl. had changed his attorney in the cause, without asking leave. The def. paid him the debt and adjuged to be good. Powell v. Little. 1. Bl. *rep. 8.*

885. A devise is void where it gives the same as would be taken by descent. A charge on the estate does not alter the manner of the heir's taking the land ; but if the tenure or quality be altered, the heir is a purchaser. Allen v. Heber. 1. Bl. *rep. 22.*

886. The court will not set aside a judgment for a mistake of the def's attorney, so as to allow the def. to plead the Stat. of limñs. Willet v. Atterton. 1. Bl. *rep. 35.*

887. Yerbury was subpoenaed as a witness, but his expences not tendered. He came to court, where money was tendered him but would not be sworn. Motion for an attam̃t for a contempt of the court, *per curiam* tender of expences must be made *at* the service of the *spã*. Not having been properly subpoenaed he is here but as a stander by, and it is no contempt of the court for a stander by to refuse to be examined. Bowles v. Johnson 1. Bl. *rep. 36.*

888. Any subjects may arm themselves to quell riots, rebellions etc., tho' it is most prudent to apply to a magistrate ; nor will petty irregularities in quelling them be regarded. K. v. inhabit. of Digan. *1.* Bl. *rep. 47.*

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(1) W. Blackstone, *Reports of cases determined in the several courts of Westminster Hall from 1746 to 1779*, London, 1781, 2 vols.

889. Only *bonâ fide* servants of an ambassador are privileged. Certifying or swearing that he is so is not sufficient, if the fact be not so. Poitier v. Croza. 1. B *rep. 48.*

890. For the powers of a Visitor see. 1. Bl. *re. 81.*

891. In the Stat. of wills the term *credible* witness means no more than *competent* witness. Incompetence from interest may be purged in all cases by matter subsequent to the attestation as by paiment or release, Windham v. Chetwynd. 1. Bl. *rep. 95.*

892. A factor has a lien on the goods in his possession for any general balance due to him, as well as for incidental charges on those goods ; but only so long as the goods are in his possession, Godin v. London assurance co. 1. Bl. *rep. 103.*

893. For the law on copyrights see Basket v. the university of Cambridge, 1. Bl. *rep. 105*, Basket v. Cunningham et al. *ib. 370*, Tonson v. Collins, *ib. 301. 321* Millar v. Taylor, *ib. 675*, Stationers v. Carnan. 2. Bl. *rep. 1004.* In this last it was decided that the crown had no power to grant an exclusive right to print almanacs.

894. Trusts, under the name of Uses, began under no other security than the trustee's faith, at first to avoid the stat. of Mortmain, but afterwards for other purposes. In natural justice a breach of trust is wrong : therefore the Chancellor gave a subpoena to *Cestuy que trust*, at first only against the trustee, on account of the personal confidence ; but not against the heir. Kelw. *49.* In the time of H. *6.* Fortescue first gave it against the heir. Afterwds it was extended to the Alienee unless he purchased for valuable considñ, and without notice. Till H. 8's time the widow of *trustee* had her dower, husband his courtesy, Lord his escheat. While the same persons, representing the Cestuy que trust, or his creditor could have nothing. To remedy all this the Stat. of Uses endeavored to consolidate the Use and possession, but the stat. omitted Uses upon Uses, trusts raised on terms for years. This forced trusts on the Chancery *aliusque et idem nascitur.* At first Dyer *369* (1), they were held not assignable, as being merely in action, and to be executed in Chancery ; not forfietable (*sic*) for treason, but liable for debts, not liable for dower. It was not till Nottingham's time a rational system was raised. The only difference now between trusts and legal estates is the forum where they are adjuged. Whatever would be the rule of law, if it was a real estate, is applied in Chancery to a trust estate. Dower is the only exception, because a wrong determination on that in the first instance had misled in too many others to be set to rights, but there is Courtesy of a trust, on the maxim that Equity follows the law ; and the trustee can now transmit no benefit ; per L^d,. Mansfield in Burgess v. Wheate 1. *Bl. rep. 123.* He endeavored to extend the likeness between trusts, and legal estates to an escheat of the use, but the M. R. and L^d. Keeper contra, that as the Trust burns out with the failure of all the Cestuy que trusts and their heirs, there is an end of it and nothing left to escheat. They seem to incline that the trustee shall keep it, for tho' he can take no beneficial interest which the cestuy que trust could enjoy, yet any other he might. Where a person is possessed of a thing without getting it against law, he has a title. The Master of the Rolls supposes that if a mortgageor were to die without heirs, the lands would not escheat, the mortgagee would hold absolutely ; but if he should claim his money also from the personal representatives, Chancery would compel a reconveyance of the land to them in lieu of the personalty, and as assets to answer even simple contract creditors. So if a purchaser pays before conveyance and dies without heirs, the money is a lien on the estate in the hands of the Vendor for the personal representatives of the purchaser, just as it is in the hands of the vendee, where a conveyance is made before payment. He gives no express opinion however as to the trustee, but that he may hold till a better right appears. He gives rather a different view of uses and trusts from that of L^{d}. Mansfield.

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(1) *English King's Bench Reports*, 1586...1651, abrigded by Sir Thomas Ireland, London, 1751.

895. An Appointment by will operates as a common devise, and if the heir be the appointee, he is in by descent. 1. Bl. *rep. 187*. Hurst v. E. of Winchelsea.

896. If a man is *bona fide* obliged to refund whatever money he has unlawfully received, an implied debt is thereby raised quasi *ex contractu*, and *assumpsit* will lie. If an insurer pays money on the supposed death of a person who afterwards appears to be alive, he may have a new action for it. The great benefit of this action (on an implied contract) is that the pl. need not set out the particular circumstance on which *ex aequo et bono* he demands a satisfaction ; but may declare generally for money had and received to his use, and give the special matter in evidence. So may the def. give in evidence any equitable matter to discharge himself. Per L^{d}. Mansf^{d}, Moses v. Macpherlan. 1. Bl. *rep. 219*.

897. Of 21. electors present, 9 vote for a town clerck, 11 protested against him without voting for any one else, and one other said « he suspended doing anything » ; the election is good. Where a majority do nothing, but merely dissent, they lose their votes, Oldknow v. Wainwright. 1. Bl. *rep. 229*.

898. Several questions considered relative to the effect of foreign laws on English decisions in cases arising in foreign countries. Robinson v. Bland. 1. Bl. *rep. 234. 256*.

899. At common law, before the acts concerning set-offs, if the pl. was as much indebted to the def. as the def. to him, yet the def. had no method to strike a balance but must go into a *court of Equity*, to have done what is clearly just and right, Collins v. Collins. 2.

Bur. *826*, or cross actions must have been brought. *ib. 825*.

900. The condition of a bond is an agreement in writing, and the party may go into Equity and have a specific performance of it, *ib*.

901. Ld. Mansfield lays down the true law of nations on recaptures. The true principle is « *quæ ab hostibus capiuntur statim capiuntium fiunt*, » which is to be understood when the battle is over, which is not till all immediate pursuit has ceased and all hope of recovery (*spes recuperationis*) is gone. Some writers and states, to curtail the advantages of neutrals, have drawn other lines taken partly from the equity of the *jus postliminii* of the Romans, have said that the prize must be brought infra praesidia. But it being difficult to say what custody at sea is equal to *praesidia* at land, some as Grotius and those whom he quotes, have substituted the *pernoctatis*, or 24 hours possession : some say the ship must be carried into the enemy's port, condemned there, sail out again and arrive in a friend's port. But all these circumstances are very arbitrary, and therefore this is generally exploded. Yet the English admiralty seem to practice this, as they have held property not changed till condemnation ; have decreed restitution after 14 weeks possession by an enemy because not condemned, and even after a long possession two sales and several voyages, Lucas *79*. Voet in his *commentary on the Pandects L. 49. tit. 15*, vol. 2. 1155, and many authors he refers to, maintain with great strength « *per solam occupationem dominium prædæ hostibus acquiri*, See Bynk, *Quest. jur. pub*. L. 1. c. 4, Goss v. Withers 2. Bur. 693. see 4, Robinson's *admiralty reports* (1), case of the *Henrick and Maria* : which was that of a vessel which had been taken and carried into a neutral port, condemned in a port of the captor (the Hague) and the validity of that condemnation brought into question before S^{r}. William Scott. He supposes the better opinion to have been that the consummation of the capture is not complete till it is carried *infra presidia* of the captor, or at least of an ally in the war, which, with the belligerent, and as to the operations of the common war, *unam constituunt civitatem*, but, *in latter times*, the use and practice of nations have intervened and shifted the matter from that foundation. *Placuit gentibus*, as Grotius says, that such exercises of war should be placed under public inspection, that it may be seen whether the capture has been rightly made *jure belli.* It has not been thought, in civilized society, that property of this sort should be converted without the sentence of a competent court. A court, to be competent, must have the means of enforcing it's decision : it must be able to act *in rem* upon the *corpus* or substance of the thing acquired, and on the parties, one of whom is not subject to other rights than those of war ; nor amenable to any jurisdiction but such as belongs to those who possess the rights of war against him. Where the ship is in a neutral port, and the court in a belligerent one, the *res ipsa* the *corpus*, is not within the possession of the court, and possession founds the jurisdiction. Can the court of the belligerent call on the neutral power to execute it's decrees ? most clearly not. The neutral state has nothing to do with the rights of force possessed by one belligerent against another. It owes hospitality only, and even that to a limited extent. It may forbid prizes to be brought into it's ports, except in distress, nor can the exercise of the rights of force be conveyed to the neutral by one of the belligerents ; it's

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(1) CHR. ROBINSON, *Reports of cases argued and determined in the High Court of Admiralty* ; *commencing with the judgments of the Right Honorable Sir William Scott*, Vol., I, 1800 ; II, 1801 ; III, 1802 ;

IV, 1804 ; V, 1807, London. An American edition was published at the same dates in Philadelphia ; it is not the one used by Jefferson' as his references do not correspond to the pagination of this edition own duties of neutrality prevent the acceptance of any belligerent right. Prisoners are necessary witnesses to be examined, but how can a neutral enforce their answering ? Their refusal is not contumacy but where the call is from a legal jurisdiction. Hence it results, that where a ship is in a neutral port there is a want of original jurisdiction in the belligerent country from a want of possession, and a defect of authority to enforce condemnation. Therefore by the more antient instructions in almost every country, cruisers were required to bring their prizes into the ports of the country. This is true principle, yet in some instances the practice of Great Britain has been to try in this court prizes lying in neutral countries. This court then is bound against the true principle by it's own practice : and the maxim of Bynkeschoeck « *in jure belli, quod quis sibi sumit hostibus tribuendum est,* » that « *in the conduct* of war, you must hold that to be lawful in your enemy, which you practice yourselves » is applicable in this case. Bound as I am by the course of preceding decisions, I cannot uphold the sentences of this court on prises carried into foreign courts, and disallow at the same time the validity of such as the enemy has pronounced in similar cases, and so he decided the condemnation valid. [This opinion of the English judge requires observation. First then, the state of war makes force the Arbiter of right, and the act of capture by the strongest transfers to him, and consummates the right according to strict principle. The thing is *infra presidia* as soon as the battle is over and it is in possession of the strongest. It is said indeed that a stronger force may yet overtake and wrest it from him ; therefore there must be a deduction within the fleet or port of the captor, but even then a stronger fleet may overtake and wrest it from him, or enter the port and take it out.. The possibility of rescue therefore cannot in season modify the principle that he who has vanquished his enemy has acquired a right to what he took from him, and that being in the hands of the stronger it is *infra presidia* : because that possibility never ceases during the war. S^r. William Scott having admitted that the *deductis infra presidia* constitutes the right, according to principle, goes on to say that *in latter times* the use and practice of nations has intervened, and called for an additional formality, to wit, condemnation in a competent court but it is a formality only, not a principle of right. It is founded in public convenience, public security, or, as he says, in fitness; and is only an use and practice. It may be then what in use and practice is found most convenient, most safe, and most fit. Consequently nations are free to consider, unrestrained by any existing obligations of principle, whether the earlier practice of requiring that the prize should be in a port of the belligerent or of an ally, or the practice of England and France particularly of being satisfied with her being in the port of a neutral, is most expedient ? The office of the court is merely that of examining whether the capture has been rightly made *jure belli* ? This examination does not necessarily require the presence of the vessel, it may not require a delivery of possession, if the sentence is in favor of the possessor ; and if against him, it may yet declare the right and leave to other tribunals to enforce it. It is true that if the prisoners are in a foreign port, their evidence will only be voluntary. It cannot be enforced ; and then the examination will not be with the aid of all the evidence which exists. This may be a weighty consideration with nations settling what their practice shall be : but is it only one consideration among many. Gr. Britain being strong on the ocean, her practice of allowing condemnation while the vessel is in a neutral port, is against her interest and her judge wishes to change it. But weaker nations will find an interest in adopting it. A prize being in a neutral port, if an action be brought by her former owner, and the sentence of the court of the belligerent is produced against the captor, the neutral court ought to give credit to the sentence, and to have delivery made to the party having the right, but if no sentence has been rendered by the belligerent tribunal, the usage is for the neutral not to intermeddle except in the single case where the capture has been made within their own jurisdiction. But in the war of the French revolution, the US. took cognisance of captures made by one belligerent on the other on any part of the ocean, where the capturing vessel had been fitted out in their own ports, contrary to their own laws, and brought her prize into a harbour of the U S.]

902. In the case of the Christopher, Slyboom master, S^{r}. W^{m}. Scott decides expressly that a condemnation in the court of an ally in the war is valid. In these cases he observes there is nothing to prevent the ally from proceeding to that act of hostility, condemnation, which would be a departure from the duties of neutrality in a neutral power. On the contrary there is a common interest, which justifies allies in making their ports mutually subservient, to give effect to their arms. *2.* Robinson *209.*

903. The Flad Oyen, Martenson master. This was an English ship, taken by a Frenchman, carried into a neutral port (Bergen) and condemned there by a French consul. It was urged by counsel that the name and process of an Admiralty court were not necessary, as long as the proceedings are under authority of the belligerent nation, and conformable to the law of nations; that the Madison was condemned by the Bureau de commerce at Bourdeau, and deemed good; that it is enough if the captor carries his prize into a place of security, and a neutral port has been expressly held sufficient. [*Cons. del. mare* 287. and Vattel *3.* § *132.* who says « un armateur consduit sa prise dans le premier port neutre, et l'y vend librement : mais il ne pourroit y mettre à terre ses prisonniers pour les tenir captifs, parce que guarder et retenir des prisonniers de guerre, c'est une continuation d'hostilités »; — so the

English carry their prizes into Lisbon, Leghorn, Nice, Bergen, etc., while neutral. *S^r W^m. Scott.* By the general practice of the law of nations, a sentence of condemnation is at present deemed necessary as one of the title-deeds of a prise. No man now thinks himself secure in purchasing a prize vessel, merely because she has been in the enemy's possession 24. hours, or carried *infra presidia.* The contrary has been more generally held, but in what form have these adjudications constantly appeared ? They are the sentences of courts exercising their functions in a *belligerent country.* This now produced is a sentence of a court not existing in *the belligerent country,* but pretending to be authorized within the dominions of a neutral country; but the neutral country can give no such authority. It has no cognisance over a prize, except in the single case of an infringement of it's own territory. It would be departing from the duties, and losing the benefits of it's neutral character. It would be to make it's coasts a station for hostility, nor does it appear in this case that it has given such authority. This is a mere licentious attempt to exercise the rights of war within the bosom of a neutral country, but if it could be shewn, that on general speculative principles such a condemnation was sufficient, another question always arises, how far have nations consented to carry this principles into practice ? for the law of nations stands not solely on the foundation of principle, but of practice on that principle. It sets out indeed on a general principle, and travels with it to a certain extent, wherever it stops in practice, no one nation is at liberty to say, the principle will bear going further. Now the usage of nations goes only to a condemnation by a court exercising it's functions *in a belligerent country.* If then it was proved in the clearest manner that on mere general theory such a tribunal might act in a neutral country, I must take my stand on the practice of mankind, and say that as far as that practice has gone, I am willing to go; and where it stops, I must stop. Restitution to the original owner is therefore decreed. 1. Robinson 114.

904. Tertullian maintained that god is material. He asks « quid enim Deus nisi corpus ? » That the soul also is material he adduces, among other proofs, the following : « in ipso ultimo voluptatis æstu quo genitale virus expellitur, nonne aliquid de anima sentimus exire ? » see 1. *Tableau des saints*. c. *4* (1).

905. The following are specimens of Hume's political principles (2). « I shall only ask, whether it be not sufficiently clear from all these transactions [to wit. temp. Elizab.] that in the two succeeding reigns [to wit. of James and Charles] it was the people who encroached upon the sovereign ; not the sovereign who attempted, as is pretended, to usurp upon the people » ? *note AA. to Chapt. 42* (3), — « the grievances, under which the English labored [to wit whipping, pillorying, cropping, imprisoning, fining, etc.] when considered in themselves, without regard to the constitution, scarcely deserve the name ; nor were they either burthensome on the people's properties, or any wise shocking to the natural humanity of mankind. » *c. 53*. « Had the preceding administration of the king [Charles I.] which we are apt to call arbitrary, proceeded from ambition, and an unjust desire of encroaching on the antient liberties of the people there would have been less reason for giving him any trust, or leaving in his hands a considerable share of that power which he had so much abused. But if his conduct was in a great measure derived from necessity, and from a natural desire of defending that prerogative, which was transmitted to him from his ancestors, and which his parliaments were visibly encroaching on, there is no reason why he may not be esteemed a very virtuous prince and entirely worthy of trust from his people. *note G. G. c. 56.* « That the *letter* of the law, as much as the most flaming court-sermon, inculcates passive obedience, is apparent : and tho' the spirit of a limited government seems to require, in extraordinary cases, some mitigation of so vigorous a doctrine ; it must be confessed, that the preceding genius of the English constitution had rendered a mistake in this particular very natural and excusable. » *c. 57. Ch. I.* « It is seldom that the people gain any thing by revolutions, in government. » *c. 59.* « The commons established a principle, which is noble in itself, and seems specious, but is belied by all history and experience, that *the people are the origin of all just power* (1) ». *c. 59.* « Government is instituted in order to restrain the fury and injustice of the people ; and being always founded on opinion,not on force, it is dangerous to weaken, by these speculations, the reverence which the multitude owe to authority, and to instruct them beforehand, that the case can ever happen, when they may be freed from their duty of allegiance. Or should it be found impossible to restrain the licence of human disquisitions, it must be acknoleged that the doctrine of obedience ought alone to be *inculcated*, and that the exceptions, which are rare, ought seldom or never to be mentioned in popular reasonings and discourses. » *c. 59.* « Amidst the passions and prejudices of that period, that he [Cromwell] should prefer the parliamentary to the royal cause will not appear extraordinary ; since, even at present, some men of sense and knolege are disposed to think, that the question, with regard to the justice of the quarrel, may be regarded as doubtful and uncertain », *c. 61. sub. fine.* In a debate in the H. of Commons Mar. 23. 24. Sr., James Mc Intosh quotes Burke as having said in some speech « I believe we shall all come to think, at last, with Mr Hume, that an absolute monarchy is not so bad a thing as we supposed. » *the Globe. Mar. 24. 1824.*

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(1) This passage from d'Holbach's *Tableau des Saints*, London 1770, is quoted again and translated in a letter to Thomas Cooper, Aug. 14, 1820, *M.E.*, *XV*, *267*.

(2) Jefferson has expressed in many instances his strong dislike for Hume. See to William Duane, Aug. 12, 1810, *M.E.*, *XII*, *404* ; to Horatio G. Spofford, March. 17, 1814, *XIV*, *120* ; to John Adams, Nov., 25, 1816, *XV*, *86* ; to Major John Cartwright, June 5, 1824, *XVI*, *44* ; to, Oct., 25, 1825, *XVI*, *125*.

(3) This passage is quoted in Jefferson letter to Major John Cartwright. June 5, 1824, *M.E.*, *XVI*, *43*.

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(1) Quoted in the letter to Major Cartwright.

APPENDIX

The following extracts from Locke, Milton, Broughton, Shaftesbury and Voltaire are undated and written on separate pieces of paper of irregular size. They provide an interesting supplement to the *Commonplace Book* and except for the last one may have been written during the Revolutionary period.

[*Editors' Note*]

I

LOCKE'S WORKS 2d VOL. (1)

Why persecute for diff^{ce}. in relg^{s}. opinion ?

1. for love to the person.
2. because of tendency of these opñs to dis [ ].

When I see them persecute their nearest connections and acquaintance for gross vices, I shall believe it may proceed from love. Till they do this I appeal to their own conciences if they will examine, wh. y don^{t}. find some other principle

Because of tendency.

Why not then level persecution at the crimes you fear will be introduced ? burn or hang the adulterer, cheat etc. or exclude them from offices.

Strange should be so zealous against things which tend to produce immorality and yet so indulgent to the immorality when produced. These moral vices all men acknowlege to be diametrically against X^{ty}

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(1) Taken from *A Letter Concerning Toleration*, Works, 1722; II, 232 ff.

and obstructive of salvation of souls. But the fantastical points for which we generally persecute are often very questionable; as we may be assur̃d by the very different conclusions of people.

Our Savior chose not to propagate his religion by temporal punm̃ts or civil incapacitation. If he had, it was in his almighty power. But he chose to extend it by its influence on reason, thereby showing to others how [they] should proceed.

Commonwealth is « a society of men constituted for preserv^n of their *civil interests* ».

Civil interests are « life, health, indolency of body, liberty and property ».

That the magistrate's jurisdñ extends only to civil rights from these considñs.

That the magistrate has no power but w^t. y^e people gave h^m. and the people h^{ve} n^t giv^n h^m « the care of souls bec. y w^d. not y. c^d. not, because no man h^s *right* to abandon y care of his salvation to another. No man has *power* to let another prescribe his faith. Faith is not faith with^t. believing. No man can conform his faith to the dictates of another. The life and essence of religion consists in the internal persuasion or belief of the mind. External forms of worship, when against our belief, are hypocrisy.

Rom. 14. 23. « he that doubtest is damned if he eat, because he eateth not of faith : for whatsoever is not of faith is sin ».

If it be said the magistrate may make use of arguments and so draw the heterodox to Truth, I answer, every man has a commission to admonish, exhort, convince another of error.

A church is « a *voluntary* society of men, joining themselves together of their own accord, in order to the public worshipping of God, in such a manner as they judge acceptable to him and effectual to the salvation of their souls ».

It is *voluntary* bec. no man is *by nature* bound to any church. The hopes of salvation is the cause of his entering into it. If he find anything wrong in it, he should be as free to go out as he was to come in.

What is the power of that church ?

As it is a society it must have some laws for its regulation, time and place of meeting ; admitting and excluding members etc, must be regulat^d. But as it was a spontaneous joining of members, it follows that it's laws extend to its own members only, not to those of any other voluntary society : for then by the same rule some other voluntary society might usurp power over them.

Christ has said « wheresoever 2 or 3 are gather^d. togeth. in his name he will be in the midst of them ». This is his definition of a society. He does not make it essential that a bishop or presbyter govern them. Without them it suffices for the salvation of souls.

From the dissensions among sects themselves arises necessarily a right of chusing, a necessity of deliberating to which we will conform. But if we chuse for ourselves, we must allow others to chuse also and so reciprocally. This establishes religious liberty.

Why require those things in order to ecclesiastical communion which Christ does not require in order to life eternal ? How can that be the Church of Christ which excludes such persons from it's communion as he will one day receive into the kingdom of heaven.

The arms of a religious society or church are exhortations, admonitions and advice and ultimately expulsion or excommunication. This last is the utmost limit of power.

How far does the duty of toleration extend ?

1. No church is bound by the duty of toleration to retain within her bosom obstinate offenders against her laws.
2. We have no right to prejudice another in his *civil* enjoiments because he is of another church. If any man err from the right way, it is his own misfortune, no injury to thee ; nor therefore art thou to punish him in the things of this life because thou supposest he will be miserable in that which is to come. On the contrary according to the spirit of the gospel, charity, bounty, liberality is due to him.

Each church being free, no one can have jurisdñ over another. No not even when the civil magistrate joins it. It neither acquires the right of the sword by the magistrate's coming to it, nor does it lose the rights of instruction or excommunicñ by his going from it. It cannot by the accession of any new member acquire jurisdñ over those who do not accede. He brings only himself having no power to bring others.

Suppose for instance two churches one of Arminians another of Calvinists in Constantinople. Has either any right over the other ? Will it be said the orthodox one has ? every church is to itself orthodox ; to others erroneous or heretical.

No man complains of his neighbor for ill management of his affairs, for an error in sowing his land, or marrying his daughter, for consuming his substance in taverns, pulling down, building, etc. In all these he has his liberty : but if he do not frequent the church, or there conform to ceremonies, there is an immediate uproar.

The care of every man's soul belongs to himself. But what if he neglect the care of it ? Well what if he neglect the care of his health or estate, which more nearly relate to the state, will the magistrate make a law that he shall not be poor or sick ? Laws provide against injury from others; but not from ourselves. God himself will not save men against their wills.

Ills you face.

If I be marching on with my utmost vigour in that way which according to the sacred geography leads to Jerusalem's height, why am I beaten and ill used by others because my hair is not of the right cut; because I have not been dipt right, bec. among several paths I take that which seems shortest and cleanest, bec. I avoid travellers less grave and kept company with others who are more sour and austere, or bec. I follow a Guide crowned with a mitre and clothed in white. Yet these are the frivolous things which keep X^mty^. at war.

If the Magistrate command me to [bring my commodity to a publick storehouse] I bring it because he can indemnify me if he would and I thereby lose it; but what indemnification can he give me for the Kdom of heaven ?

I cannot give up my guidance to the magistrate, bec. he knows no more of the way to heaven than I do; and is less concern̄d to direct me right than I am to go right. If the Jews had followed their kings, amongst so many, what number would have led them to idolatry ? consider the vicissitudes among the emperors, Arians, Athenians, or among our princes H. 8. E. 6. Mary, Elizabeth.

Compulsion in religion is distinguished peculiarly from compulsion in every other thing. I may grow rich by art I am compelled to follow; I may recover health by medicines I am compelled to take ag^t^. my own judgm̄t, but I cannot be saved by a worship I disbelieve and abhor.

Whatsoever is lawful in the Commonwealth, or permitted to the subject in the ordinary way, cannot be forbidden to him for religious uses: and whatsoever is prejudicial to the commonwealth in their ordinary use and therefore prohibited by the laws, ought not to be permitted to churches in their sacred rites. For instance, it is unlawful in the ordinary course of things or in a private house to murder a child. It should not be permitted any sect then to sacrifice children: it is ordinarily lawful (or temporally lawful) to kill calves or lambs they may therefore be religiously sacrificed. But if the good of the state required a temporary suspension of killing lambs, (as during a seige) sacrifices of them may then be rightfully suspensed also. This is the true extent of *toleration.*

Truth will do well enough if left to shift for herself. She seldom has received much aid from the power of great men to whom she is rarely known and seldom welcome. She has no need of force to procure entrance into the minds of men. Error indeed has often prevailed by the assistance of power or force. Truth is the proper and sufficient antagonist to error.

If any thing pass in a religious meeting seditiously and contrary to the public peace, let it be punished in the same manner and no otherwise than as if it had happened in a fair or market. These meetings ought not to be sanctuaries for faction and flagitiousness.

Locke denies toleration to those who entertain opñs contrary to those moral rules necessary for the preservation of society; as for instance, that faith is not to be kept with those of another persuasion, that kings excommunicated forfeit their crowns, that dominion is founded in grace, or that obedience is due to some foreign prince, or who will not own and teach the duty of tolerating all men in matters of religion, or who deny the existence of a God. [*It was a great thing to go so far* (*as he himself sais of the part. who framed the act of tolern*) *but where he stopped short, may go on*].

He sais « neither Pagan nor Mahometan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion ».

Shall we suffer a Pagan to deal with us and not suffer him to pray to his god ?

Why have X^ns^ been distinguished above all people who have ever lived for persecutions ? is it because it is the genius of that religion ? no it's genius is the reverse. It is refusing *toleration* to those of a different opñ which has produced all the bustles and wars on account of religion. It was the misfortune of mankind that during the dark centuries the X^n^ priests following their ambition and avarice and combining with the magistrate to divide the spoils of the people could establish the notion that Schismatics might be ousted of their possessions and destroyed. This notion we have not yet cleared ourselves from. In this case no wonder that the oppressed should rebel, and they will continue to rebel and raise disturbance until their civil rights are fully restored to them and all partial distinctions, exclusions and incapacitations removed.

Will not his own excellent rule be sufficient here too ; to punish these as civil offences. e. g. to assert that a foreign prince has power within this commonwealth is a misdemeanor. The other opñs may be despised. Perhaps the single thing which may be required to others before toleration to them would be that they would allow toleration to others.

II

EPISCOPACY (1)

Another plea for Episcopal governm̃t in Religion in England is it's similarity to the political governm̃t by a king. No bishop no king. This then with us is a plea for governm̃t by a presbytery which resembles republican governm̃t. The clergy have ever seen this. The bishops were alwais mere tools of the crown.

The Presbyterian spirit is known to be so congenial with friendly liberty, that the patriots after the restoration finding that the humour of people was running too strongly to exalt the prerogative of the crown, promoted the dissenting interest as a check and balance and thus was produced the Toleration act.

S^t. Peter gave the title of *Clergy* to all God's people till pope Higinus and y^e succeeding prelates took it from them and appropriated it to priests only. 1. Milt. 230.

Cregen being yet a layman, expounded the scriptures publickly and was therein defended by Alexander of Jerusalem and Theoctistus of Cæsarea, producing in his behalf divers examples that the privilege of teaching was antiently permitted to laymen. The first Nicene council called in the assistance of many learned lay brethren. ib. 230.

Bishops were elected by the hands of the whole church. Ignatius (the most ant^t. of the extant fathers) writing to the Philadelphians sais « that it belongs to them as to the church of god to chuse a bishop ». Cambden in his description of Scotl^{d} sais « that over all the world bps̃ had no certain diocese till pope Dionysius about the year 268 did cut them out, and that the bp̃s of Scotl^{d} ex̃d their functions in what place soever they came indifferently till temp. Malcolm 3. 1070.

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(1) The first paragraph seems to be a résumé of the first book of Milton's *The Reason of Church-Government urged against Prelaty*; the second and third paragraphs are taken from Book II, chapter III. The three following abstracts come from Milton's *Of Reformation in England*, Book I. I have not been able to find the edition used by Jefferson. It is not the London edition of 1738.

Cyprian epist. 68 sais «the people chiefly have power either of chusing worthy or refusing unworthy bps.» The council of Nice writing to the African churches exhorts them to chuse orthodox bp̃s. in the place of the dead 1. Milt. 254.

Nicephorus Phocas the Greek emperor ann. 1000 first enacted that no bp̃ sh^{d} be chosen without his will. Ignatius in his epistle to those of Trallis confesseth that the presbyters are his fellow counsellors and benchers, and Cyprian in the 6. 41. 52. epist. calls the presbyters, « his Compresbyters, » yet he was a bp̃. — A modern bp̃ to be moulded into a premature one must be elected by the people, undiocest, unrevenued, unlorded. 1. Milt. 255.

Sabellians. X^{n}. heretics. That there is but one person in the Godhead. That the « Word » and « holy spirit » are only virtues, emanations, or functions of the Deity.

Socinians. X^{n}. heretics. That the Father is the one only god, that the Word is no more than an expression of Y^{e} godhead and had not existed from all eternity; that Jes. Christ was god no otherwise than by his superiority above all creatures who were put in subjection to him by the father, that he was not a Mediator, but sent to be a pattern of conduct to men. That the punishm̃ts of hell are n^{t} etern^{l}.

Arminians. They think with the Romish church (ag^{t} the Calvinists) that there is an universal grace given to all men, and that man is always *free* and at liberty to receive or reject grace' that god creates men free, that his justice would not permit him to punish men for crimes they are predestinated to commit. They admit the prescience of god, but distinguish between fore knowing and predestinating. All the fathers, before S^{t} Austin were of this opinion. The church of Engl^{d} founded her article of predestination on his authority.

Arians. X^{n}. heretics. they avow There was a time when the Son was not, that he was created in time, mutable in nature, and like the Angels liable to sin. They deny the three persons in the trinity to be of the same essence. Erasmus and Grotius were Arians.

Apollinarians. X^{n} heretics. They affirm there was but one nature in Christ, that his body as well as soul was impassive and immortal, and that his birth, death and resurrection was only in appearance.

Macedonians. X^{n}. heretics. They teach that the Holy ghost was a meer creature, but superior in excellence to the Angels.

See Broughton, verbo « Heretics » an enumeration of 48 sects of Christians pronounced Heretics (1).

Locke's system of Christianity is this. (2)

Adam was created happy and immortal: but his happiness was to have been *Earthly*, and *earthly* immortality. By *sin* he lost this, so that he became subject to total death (like that of brutes) and to the crosses and unhappinesses of this life. At the intercession however of the son of god this sentence was in part remitted. A life conformable to the law was to restore them again to immortality, and moreover to those who *believed* their *faith* was to be counted for righteousness, not that faith without works was to save them; St. c. 2. sais expressly the contrary; and all make the fundamental pillars of Xty to be faith and *repentance*. So that a reformation of life (included under *repentance* was essential, and defects in this would be made up by their *faith*; i. e. their faith should be counted for righteousness. As to that part of mankind who never had the gospel preached to them, they are 1. Jews, 2. Pagans. or Gentiles. The Jews had the law of works revealed to them. By this therefore they were to be saved; and a *lively* faith in god's promises to send the Messiah would supply small defects. 2. The Gentiles: St. Paul sais Rom. 2. 13. « The Gentiles have the law written in their hearts » i. e. the law of nature: to which adding a faith in God, and his attributes that on their repentance he would pardon them, they also would be justified. This then explains the text « There is no other *name* under heaven by which a man may be saved », i. e the defects in good works shall not be supplied by a faith in Mahomet, Foe, or any other except Christ.

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(1) Thomas Broughton : *An Historical Dictionary of All Religions.* London 1742.

(2) Locke's *Reasonableness of Christianity as delivered in the Scriptures.*

The fundamentals of Xty. as found in the gospels are 1. Faith. 2. Repentance. That faith is every [where] explained to be a belief that Jesus was the Messiah who had been promised. Repentance was to be proved sincere by good works. The advantages accruing to mankind from our Savior's mission are these. 1. The knolege of one god only. 2. a clear knolege of their duty, or system of morality, delivered on such authority as to give it sanction. 3. The outward forms of religious worship wanted to be purged of that farcical pomp and nonsense with which they were loaded. 4 An inducement to a pious life, by revealing clearly a future existence in bliss and that it was to be the reward of the virtuous.

The Epistles were written to persons *already Christians*. A person might be a Xn. then before they were written. Consequently the fundamentals of Xty were to be found in the preaching of our savior, which is related in the gospels. These fundamentals are to be found in the epistles dropped here and there and promiscuously mixed with other truths. but these other truths are not to be made fundamentals. They serve for edification indeed and explaining to us matters in worship and morality. But being written occasionally it will readily be seen that their explanations are adapted to the notions and customs of the people they were written to. But yet every sentence in them (tho the writers were inspired) must not be taken up and made a fundamental without assent to which a man is not to be admitted a member of X'ˢ church here, or to his kingdom hereafter. The Apostles creed was by them taken to contain all things necessary to salvation, and consequently to a communion.

Endorsed : *Scraps early in Revolution.*

T*homas Jefferson Papers*, vol. 2, 326-327, Library of Congress.

III

1. SHAFTESBURY. CHARACT.

As the antients tolerated visionaries and enthusiasts of all kinds so they permitted a free scope to philosophy as a balance. As the Pythagoreans and latter Platonicks joined with the superstition of the times the Epicureans and Academicks were allowed all the use of wit and raillery against it. Thus matters were balanced; reason had [free full] play and science flourished. These contrarieties produced harmony. Superstition and enthusiasm thus let alone never raged to bloodshed persecution etc. But now a new sort of policy, which considers the future lives and happiness of men rather than the present, has taught to distress one another and raised an antipathy which no temporal interest could ever do. Now *uniformily of opñ*, a hopeful projeet, is looked on as the only remedy ag^{t}. this evil and is made the very object of govm̃t itself. If magistracy should vouchsafe to interpose thus in other sciences we should [have] as bad logic, mathematics and philosophy as we have divinity in countries where the law settles orthodoxy.

[Suppose the state should take into head that there should be an uniformity of countenance, men would be obliged to put an artificial bump or swelling here, a patch there etc. But this would be merely hypocritical] or if the alternative was given of wearing a mask 99-100 ths must immediately mask. Would this add to the beauty of nature ? Why otherwise in opinions].

[In the middle ages of X^{ty}. opposition to the state opñs was hushed. The consequence was, X^{ty}. became loaded with all the Romish follies. Nothing but free argument, raillery and even ridicule will preserve the purity of religion].

2. Cor. 1. 24. The apostles declare they had no dominion over the faith.

Thomas Jefferson Papers. vol. 2, 323-324. Library of Congress.

IV

EXTRACT FROM VOLTAIRE'S HISTORY OF AGE OF LEWIS XIV.

From 1663 till 1672 each year of this ministry was distinguished by the establishment of some manufacture or other ; the fine Cloth, which had before been brought from England and Holland, were fabricated at Abbeville ; the King advanced to the Manufacturer for each working loom, two thousand livres, besides considerable gratuities, gratifications.

In the year 1669 about 44, 200 Woollen looms were reckoned to be in the Kingdom. The silk manufactures, then brought to perfection, produced a Commerce of above fifty millions currency of that time and the advantage drawn from it was not only very much above the prime cost of the silk necessary in their fabrication, but the Cultivation of Mulberry trees soon put the Manufacturers into a condition of dispensing with foreign silk for the warp, or chain, of their stuffs.

From the year 1666 they began to make as fine Glasses (Looking Glasses I presume) as at Venice which City had always before furnished the whole consumption throughout Europe and they soon made pieces of this kind which for largeness and beauty, could never be imitated (equalled he means) in any other place. The Carpets of Turkey and Persia were surpassed at the Savonnerie, a place in Paris so called from the Soap-works formerly carried on there. The Tapestry of Flanders was inferior to that of the Gobelins which vast inclosure so called, was filled with above 800 workmen; within this inclosure was also made a beautiful kind of Mosaic work and the art of marquetry, or inlaying was carried to its perfection — Sixteen hundred Girls were employed in Lace works and thirty principal Men were brought from Venice and two hundred out of Flanders who had 36,000 Livres given them for their encouragement — The manufactory of the cloths of Sedan, and that of the tapestry hangings of Aubusson, degenerated and fallen into decay, were re-established — the rich stuffs, in which Silk is mixed with gold and Silver, were fabricated at Lyons and Tours with renewed industry — It is a thing well known that the Ministry purchased in England the secret of that ingenious machine by which stockings are made ten times faster than by knitting — Tin plates, Steel, fine Delft ware and morocco Leather, which were always brought from abroad, were made in France; but the Calvinists, who possessed the secret of making tin plates and Steel carried it away with them in the year 1686 upon the revocation of the Edict of Nantes, and imparted this advantage, with several others, to foreign Nations — The King every year expended. about 800,000 of our Livres upon the different works of taste which were fabricated in his Kingdom of which he made presents.

The above extract is peculiarly appropriate to the present period of American History when the good sense of the Nation has been directed to the encouragement of manufactures in which alone true independence subsists — America possesses within itself all the means of extensive manufactories — all that is necessary to ensure their success is proper encouragement from the Government, without which it is vain to calculate on their permanency to produce any National benefit — The great obstacle hitherto in the prosecution of extensive works has been the want of sufficient Capital; to remove which it is necessary either that several individuals combine their funds, or that proper and adequate support be given by the Government. The best mode of doing this is certainly by establishing liberal premiums for given quantities and qualities of the different articles manufactured. This excites a spirit of laudable emulation, and leads to individual exertion, which seldom fails to accomplish its object, if the reward be certain and commensurate. One of the first things to be done is to secure to the *introduction*, as well as the Invention, of ingenious and useful machines, a proportion of exclusive right, in the manner of a patent, which should be *free of expense*. Let the term be regulated according to the nature of the case, and as will hold up to foreigners an inducement to bring hither their discoveries in the same manner as is now practised in Great Britain and Ireland, France and Holland, where the greatest benefit has been experienced from this wise regulation, even though in the former Countries an enormous expense is attached to the obtaining a patent which is frequently a bar to useful inventions becoming public — How contradictory is it to load with expense that which in its very nature is designed as a gratuity.

I am sorry we should have adopted even in a small degree this mistaken policy ; for altho five and thirty Dollars is but a small sum compared to what a patent costs in England, yet to a poor inventor it may prove an insuperable obstacle to his progress. The next point of consequence appears to be granting Acts of Incorporation to Companies established for the prosecution of Manufactures — by this means the Capital of the country is concentred, and monied men will be secure in their advances without being personally obliged to attend to the details of a concern of which they may be entirely ignorant. Let these and similar regulations be pursued, and let it be seen that the present step is not a mere transient matter of pique or manoevre ; that instead of being as it is generally conceived in England, a « scarecrow of negociation », the people of the United States are firmly determined to carry it into full effect and render themselves truly independent of foreign aid, and in a short time we shall find artisans flocking to our shores to reap the benefit of so wise a Measure, and prosecute in a land of freedom those Arts which in their own country are loaded with excessive impositions and greivous taxes — to place themselves and their families in opulence instead of leading a life of the most painful drudgery by which they can scarcely obtain the bare necessaries of subsistence.

Thomas Jefferson Papers, vol. 162, 28392. Library of Congress.

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